89-348

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JACK L. HARGROVE BUILDERS, INC., a corporation, and JACK L. HARGROVE, an individual,

Petitioners,

v.

JOHN F. ROSCH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to correct a finding of fraudulent misrepresentation where Petitioners were unconstitutionally deprived of due process in violation of the Fourteenth Amendment, in that Petitioners were prevented from asserting at trial that Respondent entered his transaction with Petitioners as part of a larger scheme to commit a variety of criminal acts, now the subject of a federal indictment, and Petitioners were further prevented from introducing material evidence showing that Petitioners' statements to Respondent were immaterial to and were not relied on in any way by Respondent.

* * *

2. Whether certiorari should be granted to correct a fraud damage award where Petitioners were denied property without due process in violation of the Fourteenth Amendment, in that Petitioners were barred from introducing material evidence that Respondent suffered no injury whatsoever, in that Respondent never paid liabilities he claimed were fraudulently concealed from him and indeed sold his interest in the subject property at a profit before many of the liabilities on which he was awarded damages were paid.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, Jack L. Hargrove Builders, Inc., a corporation, and Jack L. Hargrove, an individual; the Respondent, John F. Rosch, an individual; and Gerill Corporation, a corporation, and Gerald A. Heinz, an individual.

A separate statement is being filed with the Clerk of this Court, pursuant to United States Supreme Court Rule 19.6, that, in Petitioners' belief, Gerill Corporation and Gerald A. Heinz have no interest in the outcome of this Petition.

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Petitioners Jack L. Hargrove Builders, Inc. and Jack L. Hargrove, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court for the State of Illinois entered in the above-entitled proceeding on March 29, 1989, and the denial of a Petition For Rehearing entered on May 26, 1989.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 128 Ill.2d 179, 538 N.E.2d 530 (1989) and is reprinted in the Appendix hereto at page A1, *infra.*

The order of the Illinois Supreme Court denying Petitioners' Petition for Rehearing, dated May 26, 1989, is reprinted in the Appendix hereto at page B1, *infra.*

The order of the Appellate Court for the Second District of Illinois and the judgment order and letter of opinion of the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois are unreported and are reprinted in the Appendix hereto at pages C1 and D1, *infra*, respectively.

JURISDICTION

The opinion of the Illinois Supreme Court affirming the Appellate Court's fraud judgment against Petitioners was rendered on March 29, 1989, with rehearing denied on May 26, 1989. This petition is filed within 90 days of the issuance of the Illinois Supreme Court's denial of the petition for rehearing.

Petitioners invoke the jurisdiction of this Court to review the judgment and order of the Illinois Supreme Court under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction

With this Petition Jack L. Hargrove Builders, Inc. and Jack L. Hargrove (collectively "Hargrove") ask this Court to review and reverse a finding of fraud against them arising from the sale of their interest in 110 acres of real estate in Woodridge, Illinois ("Woodridge" or the "Woodridge Properties") to a man named John F. Rosch ("Rosch"). Petitioners assert that the systematic exclusion of critical material evidence in this case prevented Hargrove from demonstrating Rosch's true motive for purchasing Hargrove's interest in Woodridge—i.e. that Rosch intended to illegally and surreptitiously obtain money in the name of others from a savings and loan which he controlled. Evidentiary rulings, made at trial and affirmed on appeal, excluded direct evidence of Rosch's fraud in dealing with his own savings and loan. These rulings violated the due process clause of the Fourteenth Amendment, in that they prevented Hargrove from (1) presenting his theory of defense to a claim of fraud brought by Rosch, (2) presenting evidence demonstrating that Rosch suffered no damage from the "fraud" he alleged, and (3) demonstrating to the court that Rosch's fraud judgment was the result of perjured testimony on matters critical to this case.

This case revolves around purportedly "fraudulent" statements made by Hargrove to Rosch at the time they signed their agreement, dated March 1, 1981. Rosch claims that inaccurate statements made by Hargrove regarding a handwritten list of invoices, first given to Rosch two months before the parties' transaction, induced Rosch to deal with Hargrove. Hargrove contends that the representations and list Rosch claims he "relied" on were, indeed,

utterly irrelevant and immaterial to Rosch who, in fact, had other motivations all his own. The courts' exclusion of material evidence, however, prevented Hargrove from showing Rosch's real motivation. The courts' exclusion of material evidence prevented Hargrove from showing Rosch's lack of reliance on, and the immateriality of, the list, and prevented Hargrove from demonstrating, irrefutably, that Rosch procured his fraud judgment by giving perjured testimony at trial.

From the moment Rosch's complaint was filed in the Illinois circuit court, Hargrove tried to establish the inherent nature of Rosch's deal with Hargrove, and tried to expose Rosch's motive for acquiring Hargrove's interest in Woodridge. Rosch's motive, specifically, was to obtain access to hundreds of thousands of dollars for personal investment activity from the very savings and loan he served as president, Glen Ellyn Savings and Loan Association ("Glen Ellyn"), and whose loans to Woodridge Rosch personally approved. Hargrove attempted to demonstrate that Rosch illegally used his position in Woodridge to obtain ready cash for himself when high interest rates made such cash otherwise unavailable. Hargrove tried to show that Rosch actively engaged in a scheme to manipulate Glen Ellyn for personal ends, and that, in fact, the representations of Hargrove and the list of invoices were utterly immaterial to Rosch's plan. In support of his theory, Hargrove attempted to introduce evidence that money which was intended to be used in Woodridge was taken out by Rosch, in Hargrove's name, for personal use instead; that Rosch concealed his interest from the Board of Directors of Glen Ellyn; and that Rosch filed false affidavits with federal authorities, to further conceal his Woodridge interest.

No court ever gave a reasoned evaluation or allowed direct and probative evidence to reveal Rosch's non-reliance on Hargrove and his true motives for his transaction. The circuit court, under a confused notion of relevancy, prevented the submission of Hargrove's evidence. The Illinois Appellate Court and the Illinois Supreme Court affirmed this decision, giving undue deference to the talisman of "manifest weight of the evidence." But, because substantially all of Hargrove's material and probative evidence was excluded, Hargrove was denied a fair hearing under the manifest weight of the evidence and under the U.S. Constitution. With Hargrove's evidence included, the manifest weight overwhelmingly favored Hargrove.

On July 13, 1989, a federal grand jury issued a 31-count criminal indictment of John Rosch and others, on (among other things) the very matters Hargrove was prevented from introducing into evidence in this case. The indictment corroborates Hargrove's contention that Rosch arranged his transaction with Hargrove in order to defraud his own savings and loan. The indictment provides clarity and support for this theory of defense and demonstrates the unconstitutionality of the rulings made against Hargrove at trial and on appeal.

The refusal to set aside the circuit court rulings by the Illinois Appellate and Supreme Courts deprived Hargrove of his property without due process of law and is a miscarriage of justice. If the Illinois courts' rulings are allowed to stand, Hargrove will be denied property without due process through the award of compensation to Rosch without any showing of actual loss, and without Hargrove having had his constitutionally guaranteed right to present his defense. Hargrove demonstrates below why a writ of certiorari should be granted to correct this injustice.

Factual Background

The parties' dispute concerned Hargrove Builders' transfer of its interest in certain real estate to Rosch under an agreement dated March 1, 1981, and the rights and liabilities related to that transfer. From approximately 1976 through February 28, 1981, Hargrove Builders was a 50% joint venturer with the Gerill Corporation ("Gerill") in the development of approximately 110 acres of real estate located in Woodridge, Illinois ("Woodridge" or the "Woodridge Properties"). C-7597; 7650-52; 8533. Hargrove and Gerill subdivided Woodridge beginning in 1976, and assigned new names (e.g. Oak Hills; Piers I and II) to each parcel. C-7736-37. Work was funded for separate parcels on an ongoing basis through construction loans. At all relevant times, Hargrove was the president of Hargrove Builders and Gerald A. Heinz ("Heinz") was the president of Gerill.[1]

As early as 1978, a primary mortgage lender for Woodridge was Glen Ellyn Savings & Loan Association ("Glen Ellyn"), whose president was John Rosch. As of January, 1981, Glen Ellyn had outstanding loans for one parcel of Woodridge, known as Piers II, totaling $3 million. Pl. Ex. 3-2. In the latter part of 1980, Hargrove Builders applied for construction loans for another portion of Woodridge, Oak Hills. In early 1981, Glen Ellyn issued six construction loan commitments for Oak Hills in the amount of $140,000 each, or $840,000, to Hargrove Builders. C-8157-58; 8161. John Rosch was personally and directly involved in approving these commitments. C-8137.

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[1] The Illinois courts' judgment as to Heinz and Gerill, third party defendants and co-plaintiffs with Rosch in the original action, is not a subject of Hargrove's Petition to this Court.

On March 1, 1981, at Heinz's suggestion, Rosch purchased Hargrove's interest in Woodridge for $200,000 and the assumption of liabilities. C-7608-09; 7817; 7826. Heinz approached Rosch, and was the only one who talked to Rosch about purchasing Hargrove's interest before March 1. C-8569-71. Hargrove and Heinz testified that Heinz wanted Rosch to purchase Hargrove's interest because he wanted access to the resources of an S&L. C-8614-15. According to Heinz, "John [Rosch] . . . lent some financial strength to the deal which Jack [Hargrove] was professing wasn't there at the time." C-7608.

The transaction took place at a time of extraordinary stress in the building market: for example, between 1980 and mid-1981, interest rates rose from 12½% to 21½%. C-7825; 8153. The predominant form of residential sale in the area was the land contract, or "article of agreement" sale, whereby new buyers made minimal down payments and low monthly payments, with a "balloon" payment made at some future date. C-8152. Land contracts for Woodridge as of March 24, 1981 were valued in excess of $6 million. C-8083; 8085-86; 8091-92.

The parties' dispute focuses on one issue, purely and simply: what motivated Rosch to purchase Hargrove's interest in Woodridge on March 1, 1981. Rosch contends he was induced by Hargrove's alleged omissions of incurred liabilities in a handwritten "list" of invoices. Hargrove claims that the handwritten "list" was irrelevant to Rosch's motivations, and that Rosch's decision to purchase Hargrove's Woodridge interest was Rosch's first step in a scheme to defraud Glen Ellyn. Hargrove's Petition is before this Court because the Illinois courts systematically and unconstitutionally prevented Hargrove from presenting evidence in support of this defense, and indeed rendered a judgment in Rosch's favor which was

based upon perjured testimony Hargrove was denied the chance to rebut.

The Parties At The Time Of The Signing Of The March 1, 1981 Agreement

At the time of the March 1, 1981 agreement, Rosch was a lawyer; accountant; licensed real estate broker; president, shareholder and member of the Board of Directors of Glen Ellyn Savings & Loan; and a member and shareholder in Attorney's Title Guaranty Fund. Moreover, at trial Rosch testified on his own behalf as an accounting expert. Rosch admitted that at Glen Ellyn, he held "ultimate responsibility" for all Glen Ellyn real estate transactions. C-8137. As of March 1, 1981, Rosch had also been involved in real estate as an attorney, broker, lender, developer, investor and title insurer. He had been involved in more than 250 real estate deals, C-7823-24, 8130-54, 9990-10000, and in fact served as Heinz's lawyer in real estate matters as recently as December, 1980. C-7702. Hargrove was a real estate developer who completed an eighth grade education and received a GED high school degree. C-8529-32. Hargrove entered into the March 1, 1981 agreement without a lawyer. C-8357.

Rosch's Actions Before March 1, 1981

Rosch testified that he made an economic decision to purchase Hargrove Builders' interest and that he took the risk knowing the market conditions. C-7878; 8122-23. Evidence showed that Rosch visited Woodridge before the transaction, observed the development in various phases of construction and prepared his own computer spread sheet on the value of the property, later destroyed. C-8430-31; 7826-27. Hargrove gave Rosch the chance to review purchase orders and contractor's statements before

March 1, the latter of which would have informed Rosch of all remaining expenses for Woodridge. C-8315; 8338-39. By his own admission, Rosch did not review these documents. C-8315.

Rosch based his claim of fraudulent misrepresentation on alleged omissions of loans and invoices from a 17-page handwritten list, prepared by Hargrove at Heinz's request two months before the transaction with Rosch. Har. Ex. 32; C-8569-72. The list was prepared to inform Heinz of outstanding expenses on Woodridge as of January, 1981, C-9599, and was reviewed by Rosch himself in January, 1981, over a month before his transaction with Hargrove. C-7608-10; 7817.

Hargrove's Theory of Defense

Hargrove maintained throughout trial that there was no fraud; that Rosch was not induced in any way by Hargrove to deal with Hargrove Builders, but in fact had personal motives all his own for the transaction, i.e., to unlawfully fund personal investment activity by illegally obtaining loans from his own savings and loan, Glen Ellyn, in the name of others.[2] Even assuming, *arguendo*, that Hargrove made fraudulent misrepresentations to Rosch, Hargrove further argued that Rosch presented no evidence demonstrating that any damage resulted from his transaction with Hargrove. Indeed, Hargrove maintained that "damages" claimed by Rosch related to liabilities which were either unpaid or were paid by others.

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[2] Hargrove was denied the admission of evidence showing that Glen Ellyn Savings and Loan was placed into receivership by federal authorities in September, 1985, as a result of Rosch's scheme. Har. Ex. 213, 220 (refused).

For example, Rosch contended that Hargrove failed to advise him of construction costs for two contractors at Oak Hills. Admitted evidence showed that in January, 1981, in his capacity as president of Glen Ellyn, Rosch authorized Glen Ellyn to approve construction loans which were intended to go towards the payment of these very contractors. C-8137; 8157-58; 8161-62; 8666-67; Har. Ex. 115. However, the trial court excluded Hargrove's introduction of contractors' statements showing that Rosch actually used Hargrove's name to obtain the construction loan proceeds for himself and, indeed, that Rosch did not pay the two contractors whose invoices he claimed Hargrove misrepresented. C-7753; 9368-77; 8739-40. Despite Rosch's having pocketed construction loan proceeds for these contractors, Rosch was awarded approximately 50% of his judgment based on these contractors' "omitted" invoices. Appendix D-1, *infra*.

One cannot envision a more sophisticated purchaser of property with which he was already intimately familiar than John Rosch. Rosch claimed to have been misled on March 1 by statements about a handwritten list he personally reviewed in January. Yet, rather than being misled, immediately after closing Rosch funneled money from his savings and loan into his pocket or the pockets of his partnership.

Hargrove tried repeatedly to demonstrate that John Rosch's transaction with Jack Hargrove was part of a sophisticated scheme to use others to obtain money from his savings and loan to fund personal investment activity. Rosch has now been indicted on this very matter. Hargrove was prepared to demonstrate that to further his scheme, Rosch concealed his interest in Woodridge from the Glen Ellyn Board of Directors, and later sub-

mitted false affidavits to the Federal Home Loan Bank Board regarding his Woodridge ownership. At every step, Hargrove was denied the right to present this case.

Evidentiary Rulings

During the course of trial, and over the objection of Hargrove's counsel, the trial court ruled that any evidence relating to events occurring after March 1, 1981 was immaterial to the issue of fraud, and excluded such evidence. C-9325-27; 9331-32. Hargrove's counsel objected that evidence of events before and after March 1 was essential both to determine damages and to demonstrate Rosch's true motivations, his lack of reliance on Hargrove, and his complete lack of credibility, essential to any showing of fraud. The trial court repeatedly excluded Hargrove's proffered evidence dated after March 1. For example:

1. Rosch testified that after he acquired Hargrove's interest in the Woodridge Properties, he advised the Glen Ellyn Board of Directors of his interest in Woodridge and abstained from voting on these matters. C-8158; 9428-29. In fact, the May 12, 1981 Glen Ellyn Board minutes show that Rosch not only concealed his interest in the Woodridge properties, but actually voted with the Board in approving Woodridge loans. Har. Ex. 299 (refused). As Hargrove informed the trial court, Rosch's concealment of his interest in Woodridge from Glen Ellyn's Board, in order to influence the Board's issuance of loans to Woodridge, constituted a direct violation of federal law, 18 U.S.C. §1014.[3] Nonetheless, the trial court refused to allow

[3] "Whoever knowingly makes any false statement or report . . . for the purpose of influencing in any way the action of . . . the Federal Home Loan Bank Board . . . , any institution the accounts

(Footnote continued on following page)

Hargrove to cross examine or present documentary evidence to refute Rosch's perjured testimony on this point. C-9428-35. Rosch has now been indicted on this matter.

2. Hargrove attempted to introduce evidence that in September, 1984, Rosch also concealed his interest in Woodridge from Federal Home Loan Bank Board ("FHLBB") authorities, when he purchased the interest of other shareholders of Glen Ellyn and acquired control over the association. C-9439-41; Har. Ex. 212 (refused). Specifically, Rosch filed a false affidavit with the FHLBB, indicating that he had never had any "loans, contracts or transactions of any kind" with Glen Ellyn. Again, Rosch's false statement was in direct violation of 18 U.S.C. §1014. Rosch's false affidavit went directly to the issues of Rosch's credibility, his true motives and the immateriality of Hargrove's representations. To the trial court, however, the evidence was merely collateral, and was denied. C-9440.

3. Proffered evidence dated after March 1, 1981 showed that Rosch falsely submitted contractor's statements to Glen Ellyn Savings to obtain money for himself, rather than to pay contractors. Such evidence went directly to both the question of Rosch's motives for transacting with Hargrove and his "damages" after having done so. Because it was dated after March 1, the court treated these as "collateral" matters, and excluded the evidence over Hargrove's objections. Har. Ex. 121; 122; 124; 126; 127;

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[3] *continued*

of which are insured by the Federal Savings and Loan Insurance Corporation . . . , any member of the Federal Home Loan Bank System, [or] the Federal Savings and Loan Insurance Corporation . . . upon any application . . . purchase . . . , or loan . . . shall be fined not more than $5,000 or imprisoned not more than two years, or both." 18 U.S.C. §1014 (1989).

131; 134 through 141 (refused); C-9326; 9359-76. Rosch has now been indicted on this matter.

4. The construction loans for Oak Hills, applied for by Hargrove in late 1980 and intended to be used to pay invoices from two contractors on Oak Hills, in fact were funded by Glen Ellyn and used by Rosch personally after Rosch acquired Hargrove's interest on March 1, 1981, according to sworn contractors' statements. Har. Ex. 127 (refused). The contractors' invoices were never paid, yet evidence on this point was denied on grounds that it was dated after March 1 and was collateral to Rosch's case for fraud. C-7753; 9368-77; 8739-40. Had it been allowed, the evidence would have shown that Rosch pocketed funds which were specifically designated to pay contractors' invoices. Because it was not allowed, Rosch was awarded damages on these allegedly omitted invoices instead.

5. After March 1, 1981, an employee for Rosch and Gerill, Daniel Gilmartin, signed lien waivers and received checks from Glen Ellyn for contractor fees, purportedly as agent for Hargrove Builders. Excluded evidence showed that the money went to Rosch and Gerill, not to Hargrove. *See* Har. Ex. 122; 123; 126; 127; 131; 149; 271 (refused); C-7735-36; 7745; 7748; 8216-17; 8230; 8240-41. The trial court refused to admit exhibits showing that Gilmartin submitted false documents to Glen Ellyn to draw money out in Hargrove's name. C-9361-62.

6. Months after acquiring Hargrove's interest in Woodridge, Rosch began to sell portions of his interest for substantial profit. Rosch transferred part of his ownership interest in Woodridge to Gerill in July, 1981, Har. Ex. 225 (refused), and sold Gerill his interest in another portion of Woodridge for $500,000 in March, 1982. Har. Ex. 232 (refused). That same March, Gerill, acting as

Rosch's intermediary, transferred Rosch's interest in some of his Woodridge land contracts to Glen Ellyn, Rosch's own company. Har. Ex. 233 (refused). One of Rosch's partnerships received over $544,000 for the sale. *Id.*

Evidence regarding Rosch's quick sale of his Woodridge interest went directly to the question of Rosch's failure to pay liabilities for which he claimed, and won, damages. The evidence also related directly to a demonstration of Rosch's true motivation for his transactior. with Hargrove. But, because the documents showing Rosch's sale of his interest were subsequent to March 1, the court not only denied their admission, C-9321-22, but also excluded Hargrove's entire line of questioning on the subject. C-8392-93. Rosch has now been indicted on this matter.

Procedural History

Following a bench trial, on February 13, 1987, the Circuit Court of Illinois for the 18th Judicial Circuit entered judgment in favor of Rosch and against Hargrove and awarded damages in the amount of $148,799.69, plus costs. *See* D1, *infra.*

The trial court's judgment as to fraud was affirmed by the Appellate Court of Illinois for the Second District on March 7, 1988, 165 Ill. App. 3d 1160 (unpublished order under Illinois Supreme Court Rule 23). *See* C1, *infra.* The Illinois Supreme Court affirmed the fraud judgment against Hargrove on March 29, 1989, *see Gerill Corporation v. J.L. Hargrove Builders*, 128 Ill. 2d 179, 538 N.E.2d 530 (1989), and denied Hargrove's petition for rehearing on May 26, 1989. *See* A1 and B1, respectively, *infra.*

At the Illinois Circuit Court, Appellate Court and Supreme Court levels, counsel for Hargrove argued that evidence relating to the issues of "theory of defense" and

damages was fundamental to the determination of this case, and that the exclusion of Hargrove's evidence on these matters effectively prevented Hargrove from defending the action against him. *See, e.g.*, C-7740-41 (September 30, 1986); C-8179-85 (October 2, 1986); C-8258-61 (October 6, 1986). After the Illinois Supreme Court ruled that Hargrove's proof that Rosch suffered no actual loss was "irrelevant", Hargrove asserted in his petition for rehearing that the lower courts' and Supreme Court's exclusion of such material evidence constituted unconstitutional deprivations of due process, in violation of the Fourteenth Amendment to the U.S. Constitution.

Indictment of Rosch

On July 13, 1989, a special federal grand jury brought a 31-count indictment against John Rosch charging him and others with racketeering, including mail fraud and wire fraud, and with violations of federal banking regulations relating to Glen Ellyn Savings. *See United States of America v. John Franklin Rosch, et al.*, No. 89 CR 592, in the United States District Court for the Northern District of Illinois; App. E1, *infra*.

The indictment charges Rosch with numerous acts of illegally obtaining Glen Ellyn funds for personal gain, and with falsifying and concealing documents from Glen Ellyn's Board of Directors. Count 29 of the indictment specifically relates to the Oak Hills development in Woodridge, and to evidence excluded in this trial. Count 29 charges Rosch with obtaining $840,000 in loans from Glen Ellyn for Woodridge in May, 1981, while Rosch was president of Glen Ellyn, even as he concealed his interest in Woodridge from the Glen Ellyn Board. App. E1, Count 29, ¶6. The indictment charges Rosch with obtaining loans for Woodridge in the name of Hargrove Builders, to conceal his

interest in Woodridge, *id.*; with causing Glen Ellyn Savings to purchase land contracts for Woodridge in March, 1982, while continuing to conceal the fact that he held a 50% interest in these contracts, *id.* at Count 29, ¶7; and with scheming to borrow an additional $3 million from Glen Ellyn for Woodridge between July, 1982 and March, 1985—again while concealing his interest in Woodridge from the Board. *Id.* at Count 29, ¶¶17-20.

The federal grand jury charges on Woodridge related directly to evidence Hargrove attempted to introduce—evidence which the trial court, Appellate Court and Supreme Court of Illinois all found was immaterial. Hargrove maintains that these rulings deprived him of his constitutional right to due process and require certiorari review by this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE ILLINOIS COURTS' EVIDENTIARY RULINGS BARRED PETITIONERS FROM INTRODUCING MATERIAL EVIDENCE IN SUPPORT OF THEIR THEORY OF THE CASE, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

This Court should grant certiorari in this case for one simple reason: erroneous evidentiary rulings by the Illinois courts worked to deprive Hargrove of his constitutional right to due process, both as to Hargrove's theory of defense and as to Hargrove's showing of "no damages." These rulings now threaten to reward John Rosch with a windfall profit of over $148,000, following a multi-million dollar swindle for which he has already been indicted.

Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process." *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J.) (concurring opinion). At a minimum, due process requires that a deprivation of life, liberty or property by adjudication "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). (emphasis added). "Persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"—at a meaningful time *and* in a meaningful manner. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). Moreover, due process requires that a party be given the opportunity to present "every available defense" on his own behalf. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

The opportunity to be heard in a meaningful manner "on every available defense" was not given to Jack Hargrove in the trial of this action. From day one, Hargrove was systematically denied the chance to show Rosch's true motives for his transaction with Hargrove, and denied the chance to show not only Rosch's lack of reliance on the handwritten list but the utter immateriality of that list.

For example, on October 2, 1986—the first day he was cross-examined by counsel for Hargrove—Rosch was cross-examined regarding his self-dealing with Glen Ellyn Savings, and particularly his use of Hargrove's name after March 1 to obtain loans for Woodridge from Glen Ellyn. All of Hargrove's counsel's questioning of Rosch on this point went towards one end: to demonstrate that Rosch's purchase of Woodridge fit into his larger scheme of using the savings and loan to fund personal investment activity

and had nothing to do with the list or with Rosch's discussions with Hargrove on March 1.

Each of Rosch's counsel's objections was sustained by the trial court; all evidence by Hargrove regarding Rosch's personal dealings after March 1 was denied. Hargrove's counsel argued that proof of his theory of defense depended on the presentation of evidence regarding Rosch's conduct both before and after March 1. Inexplicably, the trial court ruled that the only question relevant to the consideration of fraud and damages was whether an invoice was "on or off the list" as of March 1. The court ignored and excluded ample evidence and barred testimony concerning post-March 1 events relating directly to Rosch's motive, his damages and his credibility, finding that "[i]n view of the time reference, I don't perceive the relevance." C-8179.

The trial court's systematic rejection of evidence on Hargrove's theory of the case was well illustrated by the following passage.

> MR. KING: This is a more broad—this witness has testified to his loss, his alleged loss in this transaction. He has asked you to segment the transaction and look at one part of it. I say that the Court has to look at the whole transaction, including the motive of the witness to go into the transaction; and if, in fact—well, I hate to argue this, frankly, in front of the witness on the stand.
>
> THE COURT: I am going to sustain the objection. I don't—I think it is up to you to show me the relevancy of the question, and I really don't perceive it. Please proceed.
>
> * * *
>
> MR. KING [in sidebar]: Your Honor, we have asserted that part of the reason that Mr. Rosch went into this transaction—not only is he a sophisticated

real estate investor, which he clearly is at this point, but also because he had other motives in terms of covering his investment.

It is obvious that what we have here was a distressed market, and we had a real estate development that, because of economic circumstances, generally was having problems. Why does a man go into that kind of deal—particularly when he is a lawyer and a sophisticated investor?

* * *

MR. KING: How can I explain the relevance to you if you won't let me explain?

THE COURT: It's hard.

MR. KING: Honestly, Judge—

MR. MCGARRY: You can't explain it because it is not relevant, Counsel. That is the problem.

THE COURT: The thing is, what does his motive have to do with the issue in this case, whether or not he is correct or mistaken that he is entitled to recover for alleged non-disclosures? What does it have to do with it?

* * *

MR. KING: With all due—the issue isn't only on or off that list. That list might be considered by the Court for whatever the Court wants to consider it, but that's not this whole case, notwithstanding the efforts of plaintiff to portray it that way. That is not the case.

You are talking about an allegation of a fraudulent inducement into a sophisticated real estate transaction. Now, we have already seen the $200,000 cash. He bought at least $6,000,000 worth of properties plus other interests—

MR. MCGARRY: I object to that, Judge.

MR. KING: You know he didn't buy that for $200,000 alone. You have to look at the whole transaction. You can't separate it out.

> THE COURT: Well, you know, right now, I just don't perceive the relevancy of it. I am going to sustain the objection.

C-8180-85.

The court in this exchange clearly demonstrated its refusal to consider competent evidence which absolutely rebutted Rosch's claim of fraud.

The trial court's exclusion of evidence bearing on Hargrove's case theory continued on the next trial date, October 6. On that occasion, the Court granted a motion *in limine* by Rosch, preventing Hargrove from introducing evidence relating to any other litigation against Rosch, including, specifically, actions against Rosch by the Federal Home Loan Bank Board ("FHLBB") and the Federal Savings and Loan Insurance Corporation ("FSLIC"). Some 29 separate exhibits were denied as a result of the court's ruling, all of which underscored Rosch's repeated lying under oath on matters related to this transaction, his manipulation of Glen Ellyn assets for personal gain and his complete lack of credibility as to his claim of fraud.[4] C-8259; 8269-71.

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[4] Among these, Har. Ex. 206 (refused), a memorandum opinion in the matter of *FSLIC v. Glen Ellyn Savings & Loan Association*, No. 84 C 7685 (N.D. Ill. Nov. 13, 1984), ordering Glen Ellyn to comply with an FSLIC Cease and Desist Order in connection with numerous "lending practices and conflict of interest situations" in violation of FSLIC and Illinois regulations; Har. Ex. 211 (refused), a memorandum opinion in the matter of *FSLIC v. John F. Rosch*, No. 84 C 7682 (N.D. Ill. March 27, 1983), finding that Rosch acquired control of Glen Ellyn Savings without notifying the FSLIC, in violation of the Change in Savings and Loan Control Act of 1978, 12 U.S.C. §1730(q)(1982); and Har. Ex. 212 (refused), a sworn affidavit by Rosch dated September, 1984 in which Rosch states that he had no "loans, contracts or other transactions of any kind" with Glen Ellyn Savings & Loan. At trial, Rosch acknowledged that he indeed obtained loans for the Oak Hills portion of Woodridge for himself prior to 1984. C-8157-58; 9428-29.

Each subsequent attempt by Hargrove's counsel to introduce evidence on Rosch's motive for his transaction with Hargrove was also rejected. On October 7, Hargrove's counsel tried to introduce evidence demonstrating that Rosch made false statements under oath regarding his disclosure of his interest in Woodridge to the FHLBB and the Glen Ellyn Board. C-8285; 8288-89. Relying on the motion *in limine* ruling, the court not only struck these questions, but barred counsel's further attempts to ask further questions in order to develop the record for appeal. C-8290.

On October 23, Hargrove's counsel attempted to examine Rosch on the use of Hargrove's name to obtain loans from Glen Ellyn, to no avail:

BY MR. KING:

Q. Sir, did you obtain a power of attorney from Mr. Hargrove that you used in making draw requests after March 1, 1981?

MR. MCGARRY: Objection.

THE COURT: Sustained.

BY MR. KING:

Q. Did you file documents with Glen Ellyn Savings & Loan, or any other lending institution, in Mr. Hargrove's name after March 1, 1981?

MR. MCGARRY: Objection.

THE COURT: Sustained.

BY MR. KING:

Q. Did you file documents with any lending institution prior to March 1, 1981 in Mr. Hargrove's name?

A. Not to the best of my knowledge, no.

Q. Do you recall submitting documents after March 1—

MR. MCGARRY: Objection.

THE COURT: Sustained.

BY MR. KING: Judge, I'm entitled to inquire into the witness' recollection. If he says he doesn't recall or he's not sure—

THE COURT: I'm sustaining the objection for lack of relevancy.

MR. KING: I'm sorry?

THE COURT: I'm sustaining the objection for lack of relevancy. After 3/1/8 [sic]—

C-9328-29.

Justice requires that every litigant receive the fair opportunity to provide the court with material evidence in support of his valid claim. A court may regulate the cross-examination of witnesses, but this "[does] not justify an arbitrary denial of the right of a litigant to procure competent testimony . . . when the application therefor is reasonably made and pursued with due diligence according to established rules of procedure." *Evans v. Industrial Accident Commission*, 162 P.2d 488, 491-92 (Cal. App. 1945). "[C]ompetent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue in contradiction of the due process of law clause of the Constitution." *Georgia Ry. & Electric Co. v. City of Decatur*, 295 U.S. 165, 171 (1935).

In a fraud action brought by Rosch, where the issue of reliance was not only material but a prerequisite for Rosch's case, Hargrove was entitled to wide latitude in testing Rosch's truthfulness and in producing evidence which undermined Rosch's claim and revealed his true motives. *See People v. Mason*, 28 Ill.2d 396, 400-01, 192 N.E.2d 835, 838 (1963).

Illinois courts, like federal courts, can always admit evidence of subsequent acts in order to demonstrate a party's motive, in civil or criminal cases. *See People v. McDonald*, 62 Ill. 2d 448, 343 N.E.2d 489 (1975); *Joseph Taylor Coal Co. v. Dawes*, 122 Ill. App. 389 (1905), *aff'd*, 220 Ill. 145, 77 N.E. 131 (1906). *See also Zimmerman v. First Fed. Sav. and Loan*, 848 F.2d 1047, 1056-57 (10th Cir. 1988); *United States v. Cyphers*, 553 F.2d 1064 (7th Cir. 1977), *cert. denied*, 434 U.S. 843 (1977); Fed. R. Evid. 404(b). In this case, however, because the trial court systematically denied Hargrove the chance to introduce evidence of subsequent acts, it effectively prevented Hargrove from presenting dispositive evidence of Rosch's plan, and his non-reliance on Hargrove. This ruling, upheld by the Illinois Supreme Court, unconstitutionally deprived Hargrove of due process.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE ILLINOIS COURTS' EVIDENTIARY RULINGS BARRED PETITIONERS FROM INTRODUCING MATERIAL EVIDENCE DEMONSTRATING THAT RESPONDENT SUFFERED NO LOSS, AND IN SO DOING DEPRIVED PETITIONERS OF PROPERTY WITHOUT DUE PROCESS.

Legal procedures must be consistent with fundamental fairness. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24-25 (1981). Where a court awards damages with nearly unfettered discretion—with no opportunity for a defendant to demonstrate that, in fact, there was no loss—fundamental fairness is wanting and a Fourteenth Amendment due process violation exists. *Federal Deposit Ins. Corp. v. W. R. Grace & Co.*, 691 F. Supp. 87, 99 (N.D. Ill. 1988), *aff'd in pertinent part*, 877 F.2d 614 (7th Cir. 1989).

The Illinois courts' erroneous interpretation of the benefit-of-the-bargain rule—i.e. that John Rosch was injured as a result of Hargrove's "fraud"—unconstitutionally denied Hargrove of property without due process. The trial court

ruled that Rosch did not need to prove that he suffered any loss following his March 1 transaction with Hargrove. The Appellate Court and Illinois Supreme Court affirmed this ruling, and similarly affirmed the lower courts' refusal to consider Hargrove's evidence that Rosch in fact did not suffer loss. The trial court's ruling and denial of evidence on damages, affirmed by the Appellate and Illinois Supreme Courts, was a clear misuse of the benefit-of-the-bargain rule and amounted to a violation of the Fourteenth Amendment to the U.S. Constitution.[5]

The Illinois Supreme Court's ruling on the benefit-of-the-bargain was that:

> [t]he proper measure of damages under the benefit-of-the-bargain rule . . . and the formula that was used by the circuit court, was the difference between the joint venture's liabilities as misrepresented by Har-

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[5] On June 26, 1989, this Court issued the decision of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, ____ U.S. ____, 109 S. Ct. 2909 (1989). In that case the Court held that the "excessive fines" clause of the Eighth Amendment did not apply to punitive damages awards in cases between private parties. Expressly reserved in *Browning-Ferris* is the question of excessive punitive damage awards in the context of the Fourteenth Amendment; i.e. whether due process acts as a check on a trier of fact's discretion to award punitive damages, in the absence of any statutory limit. *Browning-Ferris*, 109 S. Ct. at 2921.

Hargrove's instant petition is grounded in the court's systematic exclusion of evidence, both on Hargrove's theory of defense and on damages. Hargrove submits, however, that the court's decision to grant over $148,000 in damages to Rosch, notwithstanding its refusal to admit relevant evidence on the question of damages, raises the very question reserved in *Browning-Ferris*. Because the damages awarded here did not compensate for an actual loss suffered by Rosch, they can fairly be termed "punitive." The size alone of this "punitive" damage award, so disportionate to any injury, therefore provides a constitutional basis for reversal of the Illinois court's decision. The $148,000 in damages was so excessive as to violate the Due Process Clause.

> grove and what those liabilities actually were. How Rosch and the joint venture subsequently dealt with those liabilities was irrelevant to this determination.

Opinion at 11.

Illinois' Supreme Court ruled, in essence, that Rosch's presentment of his case on fraud did not have to include a showing of damages, but that damages as determined by the trial court, even without a showing of loss, would be automatically awarded instead.

Illinois courts, like all courts, are supposed to require every plaintiff to show his damages with a "fair degree of probability." *Nisbet v. Yelnick*, 124 Ill. App. 3d 466, 472, 464 N.E.2d 781 (1st Dist. 1984). Particularly where damages are "susceptible to proof in dollars and cents, direct and tangible proof [of injury]" must be offered. *Leon v. Thorlief Larsen and Son, Inc.*, 133 Ill. App. 2d 911, 913, 272 N.E.2d 799 (1st Dist. 1971). The purpose of compensatory damages is to make the plaintiff whole, but certainly not more than whole. *Kassman v. American University*, 546 F.2d 1029, 1033 (D.C. Cir. 1976).

Here, however, the Illinois courts' damage award to Rosch clearly made him "more than whole." Repeatedly, Hargrove's counsel tried to show that Rosch did not demonstrate damage as a result of his transaction with Hargrove, and that, in fact, the liabilities upon which Rosch sought damages were paid either by other persons, by the Rosch-Gerill partnership after Rosch sold his interest in the venture, or not at all. The trial court systematically excluded all of Hargrove's evidence on this subject on grounds that the material was "irrelevant." C-8480-84.

The trial court's decision to ignore Hargrove's proof regarding Rosch's non-payment of liabilities came early

in the trial. C-8434-36. On October 7, Hargrove's counsel asked whether any bills from one contractor were "paid by any entity to which you no longer had an interest [when] . . . the bill was paid?" C-8435. The trial court sustained objections that the evidence was inadmissible because "[a]ll the bills were paid subsequent to March 1." *Id.*

The following day Hargrove's counsel attempted to show that Rosch sold a portion of his partnership interest to Gerill in July, 1981 and the remainder in March, 1982. *See* Har. Ex. 225, 232 (refused). These transfers occurred before most of the purported damages were paid. Pl. Ex. 59; 70-76; Har. Ex. 225 (refused). Evidence regarding Rosch's transfer of ownership was crucial in showing that Rosch claimed and received damages for numerous invoices, even though they were only paid by the partnership after his partnership interest ended, if at all. Again the court excluded such evidence after Rosch objected that documents bearing dates from March, 1982 were "irrelevant." C-8480-84.[6]

In fact, nearly half of Rosch's entire fraud judgment, $69,797.47, related to Hargrove's alleged nondisclosure of debts to two contractors on the parcel known as Oak Hills. Testimony and excluded exhibits proffered by Har-

[6] Ironically, the court readily allowed Rosch to base his own claim for damages on payments made by Woodridge partnerships after Rosch's partnership interest was sold, and gave Hargrove no opportunity to counter. On October 1, 1986, for example, Rosch testified about sums allegedly due him as a result of $40,416 paid "by the Gerill-Rosch partnership" to the contractor Air Aid after March 1. C-7912. Hargrove's counsel's objections to such testimony were overruled, *id.*, and his attempts to cross-examine Rosch to show that Rosch was not a partner when these debts were paid was denied. C-8392; 8433-35.

grove showed that these contractors, Alsterda Cartage and Ready Paving, were supposed to be paid from Glen Ellyn construction loans, C-8368-77; 8157-58; 8161-62; 8666-67; Har. Ex. 127-2 (refused), and that Rosch himself approved these loans in January, 1981. Har. Ex. 115, C-8666-67. But neither Rosch nor anyone else paid Ready Paving; through the construction loans Rosch approved in January, he received *and retained* money intended to pay Ready Paving. Incredibly, the trial court refused to admit material evidence on this crucial point, again, because the evidence related to events after March 1. C-7753; 9368-77; 8739-40.

Hargrove was also found to have intentionally misrepresented $79,950.75 with respect to building permits and bills from the Village of Woodridge. Hargrove testified that, at the time of the March 1 agreement, he disclosed all such bills and permits for which he believed the partnership was liable. C-8721; 8658-59. It defies logic to think that Rosch, a sophisticated real estate attorney and investor, was "fraudulently misled" on the presence or absence of building permits, which were a matter of public record and readily ascertainable by Rosch. This damage award is particularly unjust because Rosch was able to introduce evidence dated after March 1, 1981 to show that the cost of building permits increased after his transaction with Hargrove. C-8721. The courts' damage award was based on this increased amount. If what occurred after March 1, 1981 was truly irrelevant under the benefit-of-the-bargain rule, Rosch should not have been able to receive a windfall based on events after that date. This award, again, constituted a taking of Hargrove's property without due process.

CONCLUSION

For the foregoing reasons, Petitioners Jack L. Hargrove and Jack L. Hargrove Builders, Inc. pray that a Writ of Certiorari issue to review the decision of the Illinois Supreme Court and, upon review, to reverse that Court's decision in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

Docket Nos. 66788, 67035 cons.—Agenda 42—September 1988.

GERILL CORPORATION *et al.*, Appellants and Cross-Appellees, v. JACK L. HARGROVE BUILDERS, INC., *et al.*, Appellees and Cross-Appellants.

JUSTICE CLARK delivered the opinion of the court:

This appeal arises out of a judgment of the circuit court of Du Page County against appellees and cross-appellants, Jack L. Hargrove Builders, Inc. and its president and majority shareholder, Jack L. Hargrove (hereinafter referred to collectively as Hargrove), awarding damages to appellee John F. Rosch for Hargrove's fraudulent misrepresentations. Following the judgment, the circuit court dismissed Hargrove's third-party complaint, which sought contribution under the Illinois Contribution Among Joint Tortfeasors Act (the Contribution Act) (Ill. Rev. Stat. 1987, ch. 70, par. 301 *et seq.*) from appellants and cross-appellees, Gerill Corporation and its president and majority shareholder, Gerald A. Heinz. The court dismissed the complaint, holding that intentional tortfeasors are not entitled to contribution under the Contribution Act. The appellate court affirmed the circuit court's decision finding Hargrove liable for fraudulent misrepresentation, but reversed the dismissal of Hargrove's third-party complaint, holding that intentional tortfeasors can receive contribution under the Contribution Act. 165 Ill. App. 3d 1160 (unpublished order under Supreme Court Rule 23).

Gerill and Heinz subsequently filed a petition for leave to appeal (No. 66788) to challenge the appellate court's

holding that intentional tortfeasors are entitled to contribution under the Contribution Act. Hargrove filed a separate petition for leave to appeal (No. 67035) raising questions, which we set out in detail below, about a number of the circuit court's evidentiary and procedural findings. We granted and consolidated both petitions. (107 Ill. 2d R. 315.) As discussed below, we reverse the appellate court's holding with respect to the Contribution Act and affirm its decision upholding the rest of the circuit court's findings.

FACTUAL BACKGROUND

In 1976, Heinz and Hargrove orally agreed that their corporations, Gerill Corporation and Jack L. Hargrove Builders, Inc., would form a joint venture to develop approximately 110 acres of land owned by Gerill in Woodridge, Illinois (the Woodridge properties). Gerill contributed the land and Hargrove managed the development and construction on the land, maintained the joint venture's records and books, and handled its financial affairs. Hargrove also obtained a $352,000 loan in 1978 from the Concordia Federal Savings and Loan Association (the Concordia loan) and then loaned $290,000 to the joint venture to pay off a mortgage held by the Glen Ellyn Savings & Loan Association on a parcel of land in the Woodridge properties.

In December 1980, Hargrove decided that due to the state of the economy at that time, it was unfeasible to continue developing the Woodridge properties as a joint venture. He thus proposed to Heinz that one partner buy out the other's interest in the joint venture. Heinz asked Hargrove to prepare a list of the joint venture's outstanding loans and open invoices, which Hargrove did in January 1981 by giving Heinz a 19-page handwritten list.

Heinz realized that he did not have enough money to purchase Hargrove's interest and so he then approached John Rosch, the president of the Glen Ellyn Savings & Loan Association and an attorney who had represented Gerill and Heinz, with the proposition that Rosch purchase Hargrove's interest in the joint venture. There is a conflict in the evidence as to whether it was Heinz's or Hargrove's idea to approach Rosch. Heinz gave Rosch the 19-page list of loans and open invoices and told him that it had been prepared by Hargrove.

Rosch, Heinz and Hargrove held a meeting on February 7, 1981, after which Rosch prepared a draft contract that Hargrove subsequently refused to sign. A new contract was then prepared (the evidence is unclear as to by whom) which provided that Rosch would purchase Hargrove's interest for $200,000. The contract specified:

> "[T]hat to the best of Jack L. Hargrove Builders, Inc. and Jack L. Hargrove individually's knowledge, they have advised the Gerill Corporation, Gerald A. Heinz and John F. Rosch of any and all open invoices and any and all liabilities in the form of monies due and owing on the properties."

Furthermore, the contract provided that Rosch, Gerill and Heinz would "assume all liabilities and responsibilities for the Woodridge properties and * * * hold [Hargrove] harmless and indemnify same from any and all debts, liabilities and claims of every kind and nature which may arise in reference to said Woodridge properties."

On March 1, 1981, the parties met to sign the contract. Rosch and Heinz testified that Rosch asked Hargrove if the 19 handwritten pages "contain[ed] all of the debts that relate to the Woodridge properties," to which Hargrove replied "Yes, they do." Hargrove denies that Rosch asked him any such question. The parties then signed the contract and on the next day Rosch paid Hargrove the $200,000.

Rosch hired an accountant, Daniel Gilmartin, to review the joint venture's books and records and to assist in their transfer from Hargrove to Rosch. After several months, Gilmartin and Rosch discovered that the joint venture's liabilities were greater than those included in the 19-page handwritten list that had been prepared by Hargrove. A number of liabilities relating to the Woodridge properties had either been omitted from the list or misstated.

PROCEDURAL HISTORY

On November 15, 1982, Rosch, Gerill and Heinz filed a four-count complaint against Hargrove in the circuit court of Du Page County seeking an accounting from Hargrove for Gerill and Heinz, a declaratory judgment for Rosch, and actual and punitive damages for Rosch, Gerill, and Heinz from Hargrove for fraudulent misrepresentation of the joint venture's liabilities. Following various motions and amendments, Rosch, Gerill and Heinz filed two separate complaints: Rosch alleging fraudulent misrepresentation and Gerill and Heinz seeking an accounting. The accounting claim has since been severed from the rest of the case.

On November 18, 1982, Hargrove filed an eight (subsequently amended to nine) count complaint against Rosch, Gerill, Heinz, the Trust Company of Glen Ellyn, and the Beverly Bank in the circuit court of Cook County (both the Trust Company and the Beverly Bank were eventually dismissed from the case.) The complaint was transferred to the circuit court of Du Page County, where it was consolidated with the case previously filed by Rosch, Gerill and Heinz. Soon thereafter, the circuit court dismissed six of the complaint's nine counts. Hargrove then filed a 10-count second amended complaint on September 6, 1983.

The first three counts of Hargrove's second amended complaint involved Hargrove's claim that under the March 1, 1981, contract, which effectuated the transfer of Hargrove's interest in the joint venture, Rosch, Gerill and Heinz were obligated to pay off the $352,000 loan which Hargrove had taken out from the Concordia Federal Savings and Loan Association. In counts I and II, Hargrove sought injunctive relief to require Rosch, Gerill and Heinz to continue making payments on the loan to prevent a mortgage foreclosure action from being brought against Hargrove during the proceedings and an order for specific performance requiring them to assume the mortgage or provide an irrevocable letter of credit for the loan at Concordia. Count III sought the same relief based upon a claimed "Conspiracy to Defraud." Count IV sought to prevent or rescind certain allegedly fraudulent conveyances by Rosch, Gerill and Heinz of their interest in the Woodridge properties without sufficient consideration "contrary to the rights of Hargrove * * * and contrary to the obligations of Heinz to Hargrove." Counts V and VI sought $30,000 in damages based upon breach of contract and promissory estoppel arguments arising out of an alleged default by Rosch, Gerill and Heinz in repaying an alleged $50,000 loan made to them by Hargrove. Counts VII and VIII were also based upon breach and estoppel arguments concerning an alleged agreement between Rosch, Gerill, Heinz, and an architect who worked on the Woodridge properties. Count IX sought rescission of the March 1 contract and restitution from Rosch, Gerill and Heinz. Count X was an action for contribution from Gerill and Heinz in the event Hargrove was found liable to Rosch for fraudulent misrepresentation.

On January 31, 1984, Hargrove brought a motion for change of venue based upon the alleged prejudice of the

circuit court judge in the case. Because it was brought well after substantial issues had been ruled upon, such as the dismissal of Hargrove's first amended complaint, the judge did not grant the motion as a matter of right. He did, however, assign the motion to another judge of the circuit court for a hearing to determine whether he, the original judge, was prejudiced. After extensive argument by both parties, it was concluded that there was no prejudice against Hargrove; the motion was denied.

Rosch, Gerill and Heinz then filed a motion to dismiss most of Hargrove's second amended complaint, which the judge granted, dismissing counts I, II, III, IV, VII, VIII, IX, and X of the complaint with prejudice. Hargrove was granted leave to amend counts VII and VIII. Hargrove then filed another motion for change of venue, alleging again that the judge was prejudiced. This time, the motion was granted and the case was transferred to a different judge of the circuit court of Du Page County.

On February 7, 1985, Hargrove sought leave to file an 11-count third amended complaint. Counts I through X of the complaint were very similar to counts I though X of Hargrove's second amended complaint. Count XI was a new claim for "Contractual Indemnification" arising out of the $352,000 Concordia loan. However, the judge would not grant Hargrove leave to file except for counts V through VIII. Hargrove was denied leave to file counts I through IV, IX and X because those counts had previously been dismissed with prejudice by the original judge in the case. Count XI of the third amended complaint was denied with leave to replead because the new judge in the case found it to be illogical on its face. In a later order, Hargrove was granted leave to file counts I and IX against Rosch because the original judge's order had dismissed those counts only as to Gerill and Heinz, not as to Rosch.

Soon thereafter, Hargrove repled a count for contractual indemnification by adding a count XII to its third amended complaint. On September 19, 1985, Hargrove's counts I, VI and IX were dismissed without leave to replead, and count XII was dismissed with leave to replead one final time for breach of contract arising out of the Concordia loan. Count VIII of the complaint was later dismissed. Hargrove subsequently filed an amended count XIII for contractual indemnification and breach of contract.

In September 1986, both Rosch (joined by Gerill and Heinz) and Hargrove filed cross-motions for summary judgment on count XIII of Hargrove's complaint. Hargrove's response to Rosch's motion consisted entirely of its responsive pleading: no affidavits or evidence of any type were attached. At the hearing on the motions for summary judgment, Hargrove attempted to support its response to Rosch's motion by using exhibits attached to Hargrove's motion for summary judgment. In ruling on Rosch's motion, however, the trial court judge would only consider matters included in or with Rosch's motion and Hargrove's response to Rosch's motion: she would not consider matters raised in Hargrove's separate motion for summary judgment. Accordingly, Rosch's motion for summary judgment was granted because Hargrove failed to present any evidence of an indemnity running to Hargrove in relation to the Concordia loan. Hargrove later filed a motion to reconsider the summary judgment order, which the trial court denied, stating:

> "Hargrove had ample time to gather evidence and prepare for the September 26, 1986 hearing on the motion for summary judgment.
>
> The question at issue was whether [Hargrove] had any liability on a $352,000 Concordia mortgage undertaken by Beverly State Bank as Trustee and had

made any payments on it for which counterdefendants had failed to indemnify them. Any payments made would be a matter particularly within the knowledge of Hargrove.

Yet Hargrove submitted nothing raising a question of fact on the issue either in response to the motion or in support of Hargrove's cross motion. Hargrove now fails to show that by exercising even a pedestrian level of diligence it could not have submitted whatever else it desired to put before the court on the issue at the time the motion was heard."

The case went to trial on September 29, 1986, on Rosch's claim of intentional misrepresentation and Hargrove's $30,000 counterclaim arising out of its alleged $50,000 loan to Rosch, Gerill and Heinz. It is not clear from the record what became of count VII of Hargrove's complaint, which alleged a breach of contract arising out of an agreement with an architect who worked on the Woodridge properties. After a 17-day bench trial, the court found that Hargrove intentionally misrepresented the liabilities of the joint venture in an amount over $1.1 million. However, the court determined that Rosch was not justified in relying on some of the misrepresentations and so reduced the amount to almost $300,000, which was then reduced to $148,799.69 to reflect Rosch's one-half interest in the joint venture. The court also ruled against Hargrove on Hargrove's counterclaim for $30,000.

During the course of the trial, Hargrove was granted leave to file a third-party complaint for contribution under the Illinois Contribution Act (Ill. Rev. Stat. 1987, ch. 70, par. 301 *et seq.*) against Gerill and Heinz based upon the allegedly fraudulent misrepresentations they made to Rosch. Hargrove, apparently without leave of the court, subsequently filed a two-count amended third party complaint for contribution based upon Gerill and Heinz's either fraud-

ulent (count I) or negligent (count II) misrepresentations. Gerill and Heinz then filed a motion to dismiss Hargrove's third amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 100, par. 2-619).

The hearing on Gerill and Heinz's motion to dismiss was after the judgment had been entered in the case for Rosch. At the hearing, the court allowed Hargrove to argue both its fraudulent and negligent misrepresentation theories, without objection by Gerill and Heinz, even though the negligence count had been filed without leave of court. On February 13, 1987, the trial court dismissed both counts of Hargrove's complaint. The dismissal of count I was based upon the first district's holding in *Bresland v. Ideal Roller & Graphics Co.* (1st Dist. 1986), 150 Ill. App. 3d 445, that intentional tortfeasors have no right to contribution under the Contribution Act. Count II was dismissed because the trial court found that "[t]he evidence show[ed] that Gerill and Heinz were not in the business of supplying information for the guidance of others in their business transaction. Consequently, an element of negligent misrepresentation is missing." The trial judge, "[i]n the interests of having substance prevail over form or a dispute on procedure," also found alternatively that "[i]f the claim were submitted on the merits, [her] judgment would be for [Gerill and Heinz] on both theories" because the evidence failed to show that Gerill and Heinz were either "in the business of supplying information for the guidance of others in their business transactions," or that they "made any intentional misrepresentation to [Rosch] or did anything pertinent other than to pass along to [Rosch] the intentional misrepresentations of Hargrove."

The appellate court affirmed all of the trial court's rulings except for its dismissal of Hargrove's third-party complaint for contribution. (165 Ill. App. 3d 1169 (unpublished order under Supreme Court Rule 23).) The court recognized that there was a conflict among the appellate districts on the contribution issue: the second district, in *Dovin v. Winfield Township* (2d Dist. 1987), 164 Ill. App. 3d 326, had found that intentional tortfeasors have a right to contribution under the Contribution Act, while the first district, in *Bresland v. Ideal Roller & Graphics Co.* (1st Dist. 1986), 150 Ill. App. 3d 445, had concluded that no such right exists. The court also noted that the fifth district, in *Pipes v. American Logging Tool Corp.* (5th Dist. 1985), 139 Ill. App. 3d 269, had held that willful and wanton tortfeasors are entitled to contribution. Following its earlier decision in *Dovin*, the appellate court below held that intentional tortfeasors are entitled to contribution and so reversed the circuit court's dismissal of count I of Hargrove's complaint. The court also determined "that the trial court erred in determining controverted facts and dismissing count II of the complaint pursuant to a section 2-619 motion." Accordingly, the case was remanded to the circuit court to consider the merits of Hargrove's contribution claim. We then granted and consolidated Gerill and Heinz's and Hargrove's petitions for leave to appeal.

HARGROVE'S APPEAL NO. 67035

In its appeal, Hargrove claims that the appellate court was wrong in affirming the circuit court's:

(1) finding that Hargrove fraudulently misrepresented the joint venture's liabilities;

(2) finding for Rosch, Gerill and Heinz on Hargrove's counterclaim for $30,000;

(3) dismissal of most of Hargrove's third amended complaint;

(4) granting of summary judgment for Rosch, Gerill and Heinz on count XIII of Hargrove's third amended complaint; and

(5) allowing Rosch to appear as an attorney for himself and with co-counsel during trial.

We begin our analysis of Hargrove's claims by recognizing that a trial court's determination that the elements for fraudulent misrepresentation have been established is a factual one. As such, it will not be disturbed unless it is contrary to the manifest weight of the evidence. (*W.E. Erickson Construction, Inc. v. Congress-Kenilworth Corp.* (1986), 115 Ill. 2d 119, 127; *Brown v. Broadway Perryville Lumber Co.* (1987), 156 Ill. App. 3d 16, 23.) The elements of the tort of fraudulent misrepresentation are:

> "(1) [a] false statement of material fact (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in [justifiable] reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance." *Soules v. General Motors Corp.* (1980), 79 Ill. 2d 282, 286.

Hargrove first argues that the circuit court incorrectly concluded that Hargrove made untrue statements. It is undisputed, however, that certain liabilities of the joint venture were either misstated or omitted from the 19-page list. Furthermore, both Rosch and Heinz testified that immediately prior to signing the March 1, 1981, contract, Hargrove answered "yes" when Rosch asked if the 19-page list was a complete list of the joint venture's liabilities. Accordingly, we will not overturn the circuit court's findings.

Hargrove further maintains that even if misrepresentations were made, Hargrove made them without actually knowing that they were false and so cannot be held liable for fraudulent misrepresentation. However, it is well established that a misrepresentation is fraudulent either where a party makes the representation knowing it is false *or* where the misrepresentation was made with a reckless disregard for its truth or falsity. (See *McMeen v. Whipple* (1961), 23 Ill. 2d 352, 355; *Buechin v. Ogden Chrysler-Plymouth, Inc.* (1987), 159 Ill. App. 3d 237, 247; W. Prosser & W. Keeton, Torts, §107, at 741-42 (5th ed. 1984).) In this case, the court, based upon evidence submitted by Rosch, found that Hargrove misrepresented the joint venture's liabilities by about $1.1 million. Even though Hargrove claims this misrepresentation was due to inadvertence, our review of the record indicates that it was reasonable for the circuit court to conclude that Hargrove, the party with exclusive control of the joint venture's books, records and financial affairs, either knowingly misrepresented the liabilities of the joint venture, or did so with a reckless disregard for whether the representations were truthful.

Hargrove next argues that Rosch did not have a right to rely upon Hargrove's misrepresentations; *i.e.*, that Rosch's reliance was unjustified. Hargrove claims that Rosch had no right to rely on the misrepresentations because Rosch could have made an effort to examine the joint venture's records himself to verify Hargrove's representations.

In addressing the issue of reliance, the circuit court disallowed recovery for over $800,000 of the almost $1.1 million in liabilities that it found Hargrove had misrepresented because the court found that Rosch's reliance

was unjustified. The disallowed items were taxes, mortgages and loans whose existence, the circuit court concluded, could have been ascertained by Rosch through reasonable and prudent diligence. The recoverable items consisted of bills for construction work and supplies, and damages arising out of a lawsuit that had been filed against the joint venture in Cook County. In allowing recovery, the circuit court explained:

> "Considering that Mr. Rosch was coming into a joint venture that had been conducted for years without any written agreement, with Mr. Hargrove having almost autonomous charge of authorizing payment for construction work and other services rendered to the venture, Mr. Rosch was justified in relying upon Mr. Hargrove's representation as to this type of liability. These kinds of liabilities fluctuate and are difficult to verify at any point in time, let alone to identify at all."

We find that the circuit court's reasoning is supported by the record in this case and is consistent with the rule that one is justified in relying upon the representations of another, without independent investigation, where the person to whom the representations are made does not have the same ability to discover the truth as the person making the representations. (*Bundesen v. Lewis* (1938), 368 Ill. 623, 633; *Glazewski v. Allstate Insurance Co.* (1984), 126 Ill. App. 3d 401, 408, *rev'd in part on other grounds* (1985), 108 Ill. 2d 243; 37 C.J.S. *Fraud* §34, at 279 (1943).) In this case, the existence of the Cook County lawsuit and information regarding the joint venture's construction costs, unlike taxes, mortgages and loans, were matters almost exclusively within the knowledge of Hargrove and it would have been difficult, if not impossible, for Rosch to discover them.

We also agree with the circuit court's finding that Rosch relied upon Hargrove's misrepresentations. Rosch testified that he used the 19-page list of liabilities to assess the value of the joint venture, that they were the only records he reviewed to determine the joint venture's liabilities, and that he relied upon them in deciding to purchase Hargrove's interest in the joint venture. Nothing in the record compels a contrary conclusion.

Hargrove's final argument with respect to the fraudulent misrepresentation claim is that the circuit court's computation of damages was incorrect. Hargrove claims that under the benefit-of-the-bargain rule, damages for fraudulent misrepresentation must be based upon the amount of money the plaintiff paid as a result of the misrepresentation. Thus, Hargrove argues, the circuit court should not have excluded evidence that the misrepresented liabilities were either never paid or were not paid until after Rosch sold his interest in the joint venture. We disagree.

Under the benefit-of-the-bargain rule, which governs the damage computations in fraudulent misrepresentation cases, damages are determined by assessing the difference between the actual value of the property sold and the value the property would have had if the representations had been true. (*Hicks v. Deemer* (1900), 187 Ill. 164, 170; *Munjal v. Baird & Warner, Inc.* (1985), 138 Ill. App. 3d 172, 186-87; *Kinsey v. Scott* (1984), 124 Ill. App. 3d 329, 341.) In this case, it was found that Hargrove represented the joint venture's liabilities as being less than they actually were. The proper measure of damages under the benefit-of-the-bargain rule, then, and the formula that was used by the circuit court, was the difference between the joint venture's liabilities as misrepresented by Hargrove and what those liabilities actually were. How Rosch or the

joint venture subsequently dealt with those liabilities was irrelevant to this determination. Our review of the record also convinces us that the results arrived at by the circuit court in applying the benefit-of-the-bargain rule were amply supported by the evidence.

We similarly find no merit in Hargrove's argument that the circuit court should not have denied Hargrove's counterclaim for $30,000 in damages arising out of an alleged $50,000 loan made by Hargrove to Rosch, Gerill and Heinz. Hargrove claims that he deposited the $50,000 loan into a checking account and that he used these funds to pay certain bills for Rosch, Gerill and Heinz. However, neither Rosch nor Heinz ever signed a note for the alleged loan. Similarly, the checking account was controlled by Hargrove and none of the alleged "borrowers" had access to the account. There was also evidence that the account had a negative balance exceeding $17,000 immediately prior to the deposit of the $50,000 and that Hargrove subsequently withdrew $20,000 from the account for his own use. Furthermore, it was undisputed that Hargrove also deposited into the account over $50,000 that was actually Rosch and Heinz's money. Finally, much of the evidence in support of Hargrove's claim was the testimony of Hargrove and Hargrove's secretary, Susan Peloza, both of whose testimony the trial judge found "incredible." As a result, the trial judge concluded that there was "a noticeable lack of supporting documentation" for Hargrove's claim.

We will not overturn a trial court's evidentiary findings unless they are against the manifest weight of the evidence. (*Schulenburg v. Signatrol, Inc.* (1967), 37 Ill. 2d 352, 356.) This is because:

> "where the testimony is contradictory, the trial judge as the trier of fact is in a position superior to a court

> of review to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof." (*Schulenburg*, 37 Ill. 2 at 356.)

Upon review, we conclude that the trial court's determinations were amply supported by the record. Accordingly, we affirm the trial court's finding for Rosch, Gerill and Heinz on Hargrove's $30,000 counterclaim.

Hargrove next claims that the circuit court erred in dismissing various counts of Hargrove's third amended complaint. The second judge in the case dismissed the counts of Hargrove's complaint because the original judge had previously dismissed similar counts in Hargrove's second amended complaint with prejudice. The second judge explained that she:

> "decline[d] to exercise discretion to readjudicate orders entered by the [original judge] in view of the length of time this cause has been pending, about three years, the stage of development, the Sec. 2-615 motions in progress, and the court file reflecting that Hargrove's motion for change of venue from [the original judge] was presented after his rulings on substantive issues, had been made."

Hargrove does not challenge the original judge's order dismissing counts of the second amended complaint. Instead, Hargrove argues that the original judge's rulings should have been disregarded by the subsequent judge. In support of this argument, Hargrove cites the rule that where a judge errs in denying a petition for change of venue, any orders entered thereafter by that judge are void. (See *Board of Education v. Morton Council, West Suburban Teachers Union Local 571* (1972), 50 Ill. 2d 258, 261-62.) From this rule, Hargrove leaps to the conclusion that Hargrove somehow demonstrated that the original judge was prejudiced and so his rulings should have been

disregarded. We disagree, however, because we do not believe that prejudice was ever demonstrated.

As discussed earlier, the original judge denied Hargrove's first petition for change of venue because neither he nor the judge who conducted a hearing on the issue found that there was prejudice against Hargrove. The court then dismissed most of Hargrove's second amended complaint. Eight months later, Hargrove brought another petition for change of venue, which was ultimately granted. However, the order was not based upon a showing of prejudice. Rather, the petition was granted because of justifiable exasperation by what the judge called the "unprofessional conduct" of Hargrove's attorneys in repeatedly making baseless allegations that the judge was prejudiced. Thus, prejudice on the original judge's part was never demonstrated and so the question of whether his rulings should have been followed was entirely within the subsequent judge's discretion. (See *McClain v. Illinois Central Gulf R.R. Co.* (1988), 121 Ill. 2d 278, 287.) We find no abuse of that discretion here.

The fourth argument advanced by Hargrove is that the circuit court erred in granting summary judgment for Rosch, Gerill and Heinz on Hargrove's counterclaim for contractual indemnification with regard to the $352,000 Concordia loan. Hargrove argues that the following "facts" do not support the circuit court's summary judgment order: (1) the loan was obtained to pay obligations on the Woodridge properties; (2) the joint venture treated the loan as a liability for the Woodridge properties; (3) the loan was included on the 19-page list of the joint venture's liabilities; (4) all Woodridge's obligations were assumed by Rosch, Gerill and Heinz under the March 1, 1981, agreement; (5) Rosch, Gerill and Heinz paid the loan for 13 months and obtained a loan extension; (6) Rosch,

Gerill and Heinz stopped paying the loan; (7) after Rosch, Gerill and Heinz stopped paying the loan, Concordia placed a claim against Hargrove for payment and then proceeded to file a foreclosure action against Hargrove, and Concordia then assigned the loan to the Intercounty Title Company of Illinois, which then filed a foreclosure action against Hargrove and continues to hold Hargrove responsible for over $450,000; and (8) Hargrove testified that his obligations on the Concordia loan have not been extinguished.

Even assuming these statements to be true, Hargrove has still failed to provide any factual basis supporting a key element of his claim for indemnity. It is clear that a cause of action on an indemnity agreement does not arise until the indemnitee either has had a judgment entered against him for damages, or has made payment or suffered actual loss. (*Fidelity & Deposit Co. v. Rosenmutter* (N.D. Ill. 1985), 614 F. Supp. 348, 351 (applying Illinois law); 42 C.J.S. *Indemnity* §14, at 588-89 (1944).) Nothing in the "facts" listed by Hargrove in its briefs before us, or in the evidence submitted to the circuit court below, indicates that Hargrove has suffered any actual loss as a result of the Concordia loan. Nor has there been a judgment against Hargrove for damages arising out of the loan. Accordingly, the circuit court was correct in granting summary judgment against Hargrove on Hargrove's claim for indemnification.

Hargrove's final contention is that the circuit court erred in allowing Rosch to represent himself at trial while also being represented by co-counsel. According to Hargrove, the circuit court's decision is contrary to Illinois law. Hargrove supports this argument by citing a number of criminal cases in which this and other courts have stated that an accused does not have the right to both act

pro se and be represented by counsel. See, *e.g.*, *People v. Ephraim* (1952), 411 Ill. 118, 122 ("An accused has either the right to have counsel act for him or the right to act himself. * * * [I]t is obvious that both of those rights cannot be exercised at the same time"); *People v. Page* (1987), 152 Ill. App. 3d 957, 959 ("There is no right, whether by Federal or State constitution, State statute or by common law, to combine representation *pro se* and by counsel").

We have examined the cases cited by Hargrove and conclude that though a party is not entitled as a matter of right to be represented both *pro se* and by counsel, it is within a trial court judge's discretion to allow such dual representation. Our view is in accord with the opinions of Federal and State courts that have considered the issue. (See, *e.g.*, *O'Reilly v. New York Times Co.* (2d Cir. 1982), 692 F.2d 863, 868; *United States v. Hill* (10th Cir. 1975), 526 F.2d 1019, 1024; *State v. Cannon* (Ariz. App. 1980), 127 Ariz. 147, 149, 618 P.2d 641, 643; *Hooks v. State* (Del. 1980), 416 A.2d 189, 198; *Wallace v. State* (1977), 267 Ind. 43, 45, 366 N.E.2d 1176, 1177; *State v. Ames* (1977), 222 Kan. 88, 101, 563 P.2d 1034, 1045; *Callahan v. State* (1976), 30 Md. App. 628, 634, 354 A.2d 191, 194; *State v. Velanti* (Mo. 1960), 331 S.W.2d 542, 546; *State v. McCleary* (1977), 149 N.J. Super. 77, 80, 373 A.2d 400, 401.) Based upon our review of the record, we hold that the trial court judge did not abuse her discretion in allowing Rosch to both act as his own attorney and be represented by co-counsel.

GERILL AND HEINZ'S APPEAL NO. 66788

We turn now to the question raised by Gerill and Heinz of whether intentional tortfeasors are entitled to contribution under the Illinois Contribution Among Joint Tort-

feasors Act (Ill. Rev. Stat. 1987, ch. 70, par. 301 *et seq.*). This question of statutory interpretation has divided the districts of the appellate court in this State. (See *Dovin v. Winfield Township* (2d Dist. 1987), 164 Ill. App. 3d 326, 344 (intentional tortfeasors are entitled to contribution); *Bresland v. Ideal Roller & Graphics Co.* (1st Dist. 1986), 150 Ill. App. 3d 455, 456 (intentional tortfeasors are not entitled to contribution); see also *Pipes v. American Logging Tool Corp.* (5th Dist. 1985), 139 Ill. App. 3d 269, 274 (willful and wanton tortfeasors are entitled to contribution).) To answer, we must determine the General Assembly's intent in enacting the Contribution Act.

Hargrove argues that the intent of the legislature can be ascertained by the language of the Contribution Act itself. Where the language of a statute "is unambiguous, a court must enforce the law as enacted without considering other aids." (*County of Du Page v. Graham, Anderson, Probst & White, Inc.* (1985), 109 Ill. 2d 143, 151.) The Contribution Act provides, in part:

> "§2. Right of Contribution. (a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them." (Ill. Rev. Stat. 1987, ch. 70, par. 302.)

The statute does not differentiate between intentional and nonintentional torts or tortfeasors. Nor does the statute explicitly limit itself to nonintentional torts. Instead, it uses the term "persons liable in tort" and "tortfeasors." Hargrove asserts that the word "tort" is normally and popularly understood to include both intentional and nonintentional torts, and so Hargrove claims that the statute's

language clearly provides intentional tortfeasors with a right of contribution. We disagree, however, because we find that the meaning of the term "tort" is ambiguous.

Although phrases like "negligent tort" and "intentional tort" are fairly susceptible to definition, the meaning of the term "tort," by itself, is not so clear. As Prosser stated in his treatise on torts:

> "[A] really satisfactory definition of a tort is yet to be found. The numerous attempts which have been made to define the term have succeeded only in achieving language so broad that it includes other matters than torts, or else so narrow that it leaves out some torts themselves." (W. Prosser & W. Keeton, Torts §1, at 1-2 (5th ed. 1984).)

Similarly, Wigmore stated that "Never did a Name so obstruct a true understanding of the Thing. To such a plight has it brought us that a favorite mode of defining a Tort is to declare merely that it is not a Contract." (1 J. Wigmore, Select Cases on the Law of Torts, at vii (1912), quoted in W. Prosser & W. Keeton, Torts §1, at 2 n.3 (5th ed. 1984).) One such ambiguous statement was this court's definition of a tort as " 'an act or omission giving rise, in virtue of the common law jurisdiction of the court, to a civil remedy which is not an action of contract.' " (*Morris v. Jamieson* (1903), 205 Ill. 87, 105, quoting F. Pollock, Law of Torts 4.) Clearly, the problems courts and commentators have had in defining the term indicate that the meaning of the word "tort" is ambiguous. Due to this ambiguity, it is appropriate for us to look to the legislative history of the Contribution Act to aid in determining the General Assembly's intent. *People v. Boykin* (1983), 94 Ill. 2d 138, 141.

This court has frequently noted that the General Assembly enacted the Contribution Act to codify the decision

in *Skinner v. Reed-Prentice Division Package Machinery Co.* (1977), 70 Ill. 2d 1, in which this court discarded the no-contribution-among-tortfeasors rule. (See, *e.g.*, *Doyle v. Rhodes* (1984), 101 Ill. 2d 1, 8-9; *Coney v. J.L.G. Industries, Inc.* (1983), 97 Ill. 2d 515, 521-22.) As a result, an examination of the opinion in *Skinner* is appropriate to help ascertain whether the General Assembly intended to create a right of contribution for intentional tortfeasors.

In *Skinner*, this court held that a defendant in a strict liability action could maintain a cause of action against a third party for contribution. (*Skinner*, 70 Ill. 2d at 16.) Before *Skinner*, tortfeasors were not entitled to contribution in Illinois. The origin of this rule was the English case of *Merryweather v. Nixan* (K.B. 1799), 101 Eng. Rep. 1337. However, as this court explained in *Skinner*, *Merryweather* had been misapplied by the great majority of American courts, including Illinois courts, to stand for a rule prohibiting contribution for all tortfeasors. What *Merryweather* actually held was that there is no right to contribution for *intentional* tortfeasors. *Merryweather* did not change the general rule that nonintentional tortfeasors were entitled to contribution. (*Skinner*, 70 Ill. 2d at 8-9.) Thus, this court concluded in *Skinner* "that there is no valid reason for the continued existence of the no-contribution rule." *Skinner*, 70 Ill. 2d at 13.

One justice who dissented from the majority opinion in *Skinner* noted that though the majority's discussion of *Merryweather* suggested that the rule against contribution was still in force for intentional tortfeasors, the majority did not make this explicit. Consequently, the dissent found it necessary to "state clearly that it is being retained." *Skinner*, 70 Ill. 2d at 19 (Ward, C.J., dissenting).

Hargrove incorrectly interprets the decision in *Skinner* as abolishing the no-contribution rule for all tortfeasors.

Skinner held only that a right of contribution exists for a defendant in a strict liability action. The issue of whether contribution exists for intentional tortfeasors was not before the court and therefore was not addressed. However, as noted by the dissent in *Skinner*, the majority's reliance on the *Merryweather* decision, which held that intentional tortfeasors were not entitled to contribution, indicates that the no-contribution rule for intentional tortfeasors was being retained.

Our reading of the *Skinner* decision is consistent with the General Assembly's reading of the case prior to enacting the Contribution Act. Nothing in the legislative history of the Contribution Act indicates that the General Assembly, in codifying the *Skinner* decision, intended to create a right of contribution for intentional tortfeasors. Instead, statements made during the floor debates by both the Senate and House sponsors of the bill that was to become the Contribution Act demonstrate that the statute was meant to create a right of contribution for negligent tortfeasors. Senator Berman stated:

> "This is a bill that addresses a problem that arose from a Supreme Court decision known as the Skinner case. Skinner versus Reed Prentice in which the question of the obligation of different defendants in a tort action . . . *negligence* action would be resolved." (Emphasis added.) (81st Ill. Gen. Assem., Senate Proceedings, May 14, 1979, at 173.)

Similarly, Representative Daniels explained:

> "When you have people that are responsible for monetary damages and there's more than one person and they have been *negligent* resulting in a judgment entered against more than one person, they are called joint tortfeasors. What this Bill says is that they should be responsible to pay their prorate [*sic*] share, and if this has not occurred, that the parties

> between themselves may have an action. Now, this is a result of the Skinner versus Reed decision handed down by the Illinois Supreme Court." (Emphasis added.) 81st Ill. Gen. Assem., House Proceedings, June 14, 1979, at 22.

Hargrove argues that the Senate indicated an intent to include intentional tortfeasors in the Contribution Act by deleting a clause from the original bill that would have expressly excluded a "right of contribution in favor of any tortfeasor who had intentionally either caused or contributed to the injury or wrongful death." (See Committee Amendment I to Senate Bill 308.) We note initially that this is not a case where the full Senate deleted statutory language after full debate on the Senate floor. Instead, the language here was deleted by the Senate Judiciary Committee and adopted without discussion by the full Senate before the bill went to the House. As a result, no record containing information as to why the clause was deleted exists. It could be, contrary to Hargrove's assertion, that the clause was originally drafted in response to the dissent in *Skinner* and deleted only to align the bill closer to the majority's opinion, which was also silent on the matter. Whatever the case may be, we will not engage in speculation to determine the legislature's intent in deleting the clause. Accordingly, we are not persuaded that the deletion of the clause regarding intentional tortfeasors, without any indication as to why it was deleted, is in any way indicative of the General Assembly's intent. See *Rastelli v. Warden, Metropolitan Correctional Center* (2d Cir. 1986), 782 F.2d 17, 24 n.3; *Maiter v. Chicago Board of Education* (1980), 82 Ill. 2d 373, 385.

We conclude, therefore, that intentional tortfeasors are not entitled to contribution under the Illinois Contribution Among Joint Tortfeasors Act (Ill. Rev. Stat. 1987,

ch. 70, par. 301 *et seq.*). We thus overrule the decision in *Dovin v. Winfield Township* (2d Cir. 1987), 164 Ill. App. 3d 326, which held to the contrary. We also reverse that part of the appellate court's decision that held that there is a right to contribution for intentional tortfeasors. We affirm the rest of the appellate court's decision upholding the circuit court's findings with respect to Rosch's and Hargrove's claims and counterclaims.

No. 66788—Appellate court reversed;
circuit court affirmed.
No. 67035—Judgment affirmed.

WARD and CALVO, JJ., took no part in the consideration or decision of this case.

APPENDIX B

SUPREME COURT OF ILLINOIS

Springfield, Illinois, May 26, 1989

THE FOLLOWING CASES ON THE REHEARING DOCKET WERE DISPOSED OF AS INDICATED:

* * *

Nos. 66788—Gerill Corporation, etc., et al., appellants, v.
67035 Jack L. Hargrove Builders, Inc., etc., et al.,
Cons. appellees. Appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause. Ward and Calvo, JJ., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 5, 1989.

APPENDIX C

[FILED MARCH 7, 1988]

No. 2-87-0233

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

GERILL CORPORATION, an Illinois corporation, and GERALD A. HEINZ and JOHN F. ROSCH, individuals,

Plaintiff, Counter-Defendants, Appellees and Cross-Appellant,

v.

JACK L. HARGROVE BUILDERS, INC., a corporation, and JACK L. HARGROVE, an individual,

Defendants, Counter-Plaintiffs, Appellants and Cross-Appellees.

JACK L. HARGROVE BUILDERS, INC., a corporation, and JACK L. HARGROVE, an individual,

Third Party Plaintiffs and Appellants,

GERILL CORPORATION, an Illinois corporation, and GERALD A. HEINZ, an individual,

Third Party Defendants and Appellants.

Appeal from the Circuit Court of DuPage County
No. 82 CH 1032
Hon. Helen C. Kinney and
Hon. John S. Teschner, **Judges Presiding**.

C2

ORDER PURSUANT TO SUPREME COURT RULE 23

Defendants, Jack L. Hargrove and Jack L. Hargrove Builders, Inc. (hereinafter referred to as Hargrove), appeal from a judgment of the circuit court which found that Hargrove had intentionally misrepresented liabilities of a joint venture sold to plaintiff, John F. Rosch, and awarded Rosch $148,799.69 in compensatory damages. The judgment also denied count V of Hargrove's counterclaim against counterdefendants, Rosch; Gerill Corporation (Gerill); and the president of Gerill, Gerald A. Heinz, based on breach of contract. In a supplemental order, the court dismissed Hargrove's third-party complaint which sought contribution from Gerill and Heinz. Hargrove also appeals the summary judgment entered on count XIII of Hargrove's counterclaim against Rosch, Gerill, and Heinz for breach of contract and contractual indemnification. Hargrove further asserts error in the trial court's denial of a change in venue and in certain orders relating to discovery.

Rosch cross-appeals from the trial court's denial of prejudgment interest on the judgment.

This litigation arose out of a joint venture to develop real estate entered into between some of the parties. In 1976, plaintiff, Gerill, and defendant, Hargrove, orally agreed to develop, through a joint venture, approximately 110 acres of land in Woodridge, Illinois ("Woodridge properties"). In 1978, Hargrove borrowed $352,000 from Concordia Federal Savings and Loan ("Concordia loan"), and the sum of $290,000 was loaned to the joint venture and used to retire a mortgage indebtedness on the Woodridge properties. In December 1980, Hargrove informed Heinz that he believed that the joint venture was no longer worth pursuing given the current economic conditions, and that either Gerill or Hargrove should take over

the development of the Woodridge properties. Hargrove offered to sell his interest in the joint venture to Gerill. Heinz expressed interest in Hargrove's proposition, and requested that Hargrove prepare a list of outstanding loans for the Woodridge properties and a list of open invoices. Hargrove, who maintained the books and records of the joint venture, compiled these lists in January 1981.

In mid-January, Heinz approached Rosch, an attorney who had represented Gerill and Heinz, and proposed that Rosch buy Hargrove's interest in the joint venture and join Gerill as a partner in the development of the Woodridge properties. Heinz told Rosch that Hargrove had prepared the lists of loans and invoices, and Rosch, based upon the information provided by Heinz, including Hargrove's list of liabilities, offered to pay Hargrove $200,000 for its interest in the joint venture. Hargrove accepted Rosch's offer.

On March 1, 1981, Hargrove, Gerill, Heinz, and Rosch executed an agreement ("March Agreement") under which Hargrove agreed to sign over his interest in the Woodridge properties for $200,000. The March Agreement provided that to the best of Hargrove's knowledge, they had advised Gerill, Heinz, and Rosch of all open invoices and liabilities on the Woodridge properties. The agreement further provided that Gerill, Heinz, and Rosch would assume all liabilities and responsibilities for the Woodridge properties and would indemnify Hargrove from all debts, liabilities, and claims which may arise in reference to the Woodridge properties. Rosch testified that before signing the March Agreement, he asked Hargrove whether the lists of loans and invoices contained all of the debts related to the Woodridge properties, and Hargrove told him that it did. Heinz also testified that Hargrove said that the list of outstanding debts was complete.

Daniel Gilmartin, an accountant employed by Rosch, testified that prior to the March Agreement he was unable to create a balance sheet for the joint venture as of March 1, 1981, because he had received inadequate records from Hargrove concerning assets and liabilities. Gilmartin stated that he never received from Hargrove records that would indicate the amounts owed on the Woodridge properties on March 1, 1981. Susan Peloza, Hargrove's corporate secretary, testified that Gilmartin was given all Hargrove's records.

Hargrove testified that after the March Agreement, Heinz requested that Hargrove pay certain pre-existing obligations for the Woodridge properties, and Hargrove deposited $50,000 in a bank account for the purpose of doing so. Hargrove wrote two checks totaling $20,000 from this account to himself, and Peloza testified that she sent a letter to Gilmartin requesting that $30,000 be repaid to Hargrove.

During the ensuing months following the March Agreement, Rosch ascertained that several debts, which had a material effect upon the liabilities of the joint venture, were either omitted from the list or misstated by Hargrove. On November 15, 1982, Gerill, Heinz, and Rosch, filed their complaint alleging fraud.

On November 18, 1982, Hargrove filed a complaint in the circuit court of Cook County which was subsequently transferred to Du Page County, and consolidated with the other action. Hargrove filed an amended complaint and a second amended complaint. In April 1984, the trial court entered an order dismissing, *inter alia*, counts alleging breach of contract, fraud, and fraudulent conveyances by Gerill, Heinz, and Rosch.

Hargrove filed a third amended complaint in 1985, and in September 1986, the court entered summary judgment for Rosch, Gerill, and Heinz on count XIII of Hargrove's third amended complaint which alleged a breach of contract on the Concordia loan.

After 17 days of bench trial, the trial court issued a letter of opinion on December 18, 1986, in which it found that: (1) Hargrove was guilty of intentional misrepresentation, and awarded damages to Rosch; (2) Hargrove was not entitled to recover on his counterclaim for the $30,000 balance on an alleged loan to the joint venture; and (3) the circuit court should not reconsider its summary judgment on count XIII of Hargrove's complaint. The trial court also noted that this litigation was sometimes made "unnecessarily complex" by the parties.

In January 1987, Rosch filed a motion for prejudgment interest and on February 13, 1987, the court entered two judgment orders which generally conformed to findings set forth in its letter of opinion. In addition, the court dismissed Hargrove's third party complaint against Gerill and Heinz for contribution, and denied interest on the judgment against Hargrove for fraud. This appeal followed.

Hargrove first contends that the evidence was insufficient to establish that he made intentional misrepresentations regarding the liabilities of the Woodridge properties. Hargrove argues that he made no misrepresentations, he lacked the intent to deceive, and Rosch had no right to rely on any misrepresentations.

Whether elements of an action for fraudulent misrepresentation are established is a question for the trier of fact, and its decision will not be disregarded unless it is against the manifest weight of the evidence. (*Kinsey v. Scott* (1984), 124 Ill. App. 3d 329, 335-36, 463 N.E.2d 1359). The

evidence does not establish that Hargrove substantially understated the liabilities against the Woodridge properties. A trial court's findings of fact with respect to intent to deceive when misrepresentations are made will not be reversed unless they are against the manifest weight of the evidence. (*Kinsey*, 124 Ill. App. at 337), and we are unable to make such a finding in this instance. The fact that the liability lists were prepared by Hargrove in January 1981, prior to the March agreement, does not alter the fact that liabilities were understated, and that there was testimony by Heinz and Rosch that Hargrove represented that the list was complete. The question of whether a party had a right to rely in a given set of circumstances is to be answered in light of all facts which he knew or should have known in the exercise of ordinary prudence. (*Kinsey*, 124 Ill. App. at 337-8). The trial court here found that, since Hargrove had almost exclusive charge of paying joint venture liabilities, it was reasonable for Rosch to rely on Hargrove's representations as to the liabilities when he became involved in the joint venture. We will not disturb this finding.

Hargrove next suggests that the damages awarded to Rosch were inappropriate because the court made a number of erroneous factual determinations, improperly excluded evidence relating to damages, and that there was no evidence that Rosch suffered injury. We have considered Hargrove's arguments regarding claimed erroneous factual determinations and error in the admission of evidence by the trial court and find them to be without merit. The amount of the damages is supported by the evidence produced in trial. The court also properly applied the general rule that the measure of damages for fraud is an amount which will compensate the plaintiff for the loss occasioned by the fraud (*Brown v. Broadway Perryville Lumber Co.* (1987), 156 Ill. App. 3d 16, 25, 508

N.E.2d 1170.), and awarded Rosch 50% of the amount the liabilities exceeded disclosure.

Hargrove next contends that the trial court erred in granting summary judgment on count XIII of his third amended complaint which alleged breach of contract and a right to contractual indemnification with regard to the Concordia loan. Rosch responds that summary judgment was proper because the trial court's subsequent finding of fraud is an absolute defense to the March agreement upon which count XIII of Hargrove's third amended complaint was based. Rosch, Gerill, and Heinz argue that the trial court correctly concluded that Hargrove had no claim for contractual indemnification under the March agreement as the court found that Hargrove failed to show any debt or liability asserted against him arising out of the Woodridge venture which required indemnification. Subsequently, apparently in an attempt to establish a loss upon which indemnification could be premised by introducing evidence that he was liable for the Concordia loan by virtue of a title indemnity clause of a title insurance policy, Hargrove requested that the court reconsider its ruling. Hargrove's motion for reconsideration was denied as untimely, and we find no error. Hargrove failed to establish that he was entitled to indemnification for the Concordia loan, and later improperly sought to relitigate the motion for summary judgment.

Hargrove challenges numerous evidentiary rulings by the trial court which he asserts resulted in the exclusion of relevant evidence. A trial court's determination of whether evidence is relevant is largely within its discretion, and its ruling should not be reversed absent a clear abuse of discretion. (*Benson v. Bradford Mutual Fire Insurance Corp.* (1984), 121 Ill. App. 3d 500, 459 N.E.2d 689, *appeal denied; Kyowski v. Burns* (1979), 70 Ill. App. 3d 1009,

1018, 388 N.E.2d 770, *appeal denied.*) We find no abuse of discretion in the exclusion of evidence based on relevancy grounds, nor do we find error in the court's exclusion of documentary evidence offered by Hargrove on the ground that they were untimely, illegible, or incomplete. We further reject Hargrove's assertion that the court erroneously considered the dissolution of the Hargrove corporation in evaluating the credibility of the parties.

Hargrove next contends that the trial court improperly dismissed counts in his second amended complaint. A party who files an amended pleading waives any objection to a trial court's ruling on former complaints. (*Foxcroft Townhome Owners Association v. Hoffman Rosner Corp.* (1983), 96 Ill. 2d 150, 154, 449 N.E.2d 125; *Bundy v. Church League of America* (1984), 125 Ill. App. 3d 800, 804, 466 N.E.2d 681.) Since Hargrove filed a third amended complaint, he has waived his right to object to the trial court's ruling on the second amended complaint.

Hargrove next argues that the trial court erred when it stated that its dismissal of six fraud claims made by Rosch against Hargrove did not preclude an action for accounting against Hargrove by Rosch on *res judicata* or estoppel grounds. We fail to see how this dicta in the trial court's order harms Hargrove. The issue of the *res judicata* or estoppel effect of the judgment on any subsequent action which might be brought by Rosch was not before the court, and its comment would not resolve that issue.

Hargrove contends that the court improperly denied the counterclaim set forth in count V of its third amended complaint which alleged that Rosch, Gerill, and Heinz breached a contractual obligation to repay Hargrove $30,000 which he alleged was utilized to pay outstanding bills on the Woodridge properties after the March agreement. The court in its letter of opinion noted that the

account from which these bills were allegedly paid was under the exclusive control of Hargrove, the lack of supporting documentation for the claim, and found that Hargrove had failed to prove that the money was owed because of payments made for the joint venture on liabilities arising after the March Agreement. Whether a breach of contract has occurred is a question of fact and the judgment of the trier of fact will not be disturbed on appeal unless it is clearly against the manifest weight of the evidence. (*Levan v. Richter* (1987), 152 Ill. App. 3d 1082, 1090, 504 N.E.2d *1373*; *Susman v. Venture* (1983), 114 Ill. App. 3d 668, 674, 449 N.E.2d 143, *appeal denied.*) Here, the court found that Hargrove failed to prove a breach of contract because the evidence did not establish that the $30,000 allegedly due to Hargrove was expended on the joint venture's behalf, and its finding is not contrary to the manifest weight of the evidence.

We next consider Hargrove's assertion that the trial court made erroneous discovery rulings. A court has wide pretrial discovery discretion and its orders regarding discovery will not be disturbed absent a clear abuse of discretion. (*Robinson v. Greely & Hansen* (1983), 114 Ill. App. 3d 720, 731, 449 N.E.2d 250, *appeal denied.*) Hargrove complains of an order which struck all pending discovery motions because some of the motions had been rendered moot. As Gerill and Heinz point out, Hargrove was not harmed by the trial court's attempt to discard mooted discovery questions since Hargrove could have reasserted any motions which were not rendered moot. We further find that the order prohibiting Hargrove's discovery of financial statements, check registers, personal diaries, calendars, journals, and other items belonging to Gerill, Heinz, and Rosch on the ground of irrelevancy was not an abuse of discretion. The denial of Hargrove's motions for supplementary depositions of Rosch and Heinz

because the information sought was covered by other discovery requests was also correct. Finally, we find no merit in Hargrove's contention that the trial court erred in denying the belated motion to enforce a document subpoena on the Federal Savings and Loan Insurance Corporation.

Hargrove suggests that the court's order of February 1, 1984, was invalid because another judge, who later recused himself from the case, had denied Hargrove's first request for a change in venue. We disagree, and find that the judge's initial refusal to recuse himself did not, as Hargrove asserts, void all his subsequent orders in the cause, and render the trial court's reliance on any initial rulings by the prior judge erroneous, as Hargrove failed to establish any actual prejudice on the part of the first judge who later did recuse himself.

Hargrove also asserts that the trial court improperly allowed Rosch to appear as his own attorney because this gave "undue weight to Rosch as a litigate." Hargrove cited no relevant Illinois authority for the proposition that a litigant cannot appear as his own counsel even though represented by an attorney, and we are not inclined to limit an attorney-party participation in litigation absent authority to the contrary.

Finally, Hargrove contends that the trial court erred when it dismissed Hargrove's third-party complaint for contribution against third-party defendants, Gerill and Heinz, pursuant to section 2-619 of the Code of Civil Procedure (Ill. Rev. Stat. 1985, ch. 110, par. 2-619). We agree.

In the third-party action, Hargrove sought contribution against Gerill and Heinz on theories that they shared fault with Hargrove for intentional (count I) or negligent (count II) misrepresentation to Rosch and were joint tort-feasors under the Contribution Act (Ill. Rev. Stat. 1985, ch. 70,

par. 301, *et seq.*) The trial court in its supplemental opinion of February 13, 1987, dismissed both counts pursuant to section 2-619, finding that there was no right to contribution under the Act for an alleged intentional tort, citing *Bresland v. Ideal Roller & Graphics Co.* (1986), 150 Ill. App. 3d 445, and finding, under the evidence introduced in trial, that as "Gerill and Heinz were not in the business of supplying information for the guidance of others in their business transaction", negligent misrepresentation was not established. See *Marino v. United Bank of Illinois* (1985), 137 Ill. App. 3d 523, 528.

In *Dovin v. Winfield Township* (Docket Nos. 2-86-1151, 2-86-1169, 2d Dist. 1988) ____ Ill. App. 3d ____, ____ (slip op. at 24-27) this court held that an action will lie under the Contribution Act for an intentional tort, and count I of Hargrove's third-party complaint was thus erroneously dismissed. We also conclude that the trial court erred in determining controverted facts and dismissing count II of the complaint pursuant to a section 2-619 motion (see *e.g., Premier Electrical Construction Co. v. La Salle National Bank* (1983), 115 Ill. App. 3d 638, 643.) While it is true that the trial court in its order also purported to "alternatively" find for third-party defendants on the merits under count II, in which a theory of negligent misrepresentation was advanced, we consider only the actual basis upon which that count was dismissed.

Rosch, in his cross-appeal, contends that the trial court erroneously denied prejudgment interest pursuant to statute (Ill. Rev. Stat. 1985, ch, 17, par. 6402) on the amount of the judgment entered against Hargrove. We agree with the court's decision to deny such interest since the understated liabilities upon which the award was based do not constitute "money received to the use of another and retained without the owner's knowledge" or "money with-

held by an unreasonable and vexatious delay of payment" as required by the statute upon which Rosch relied.

We note our agreement with the court's observation that the disputes between these parties have been rendered unduly complex by the parties excessive litigation. Matters concerning the transactions between these parties has been earlier reviewed (*Hargrove v. Gerill Corp.* (1984), 124 Ill. App. 3d 924, 464 N.E.2d 1226.), and it has come to our attention through filings by them in this court that there is currently related litigation pending in the circuit court of Cook County. Although we recognize that attorneys have a responsibility to zealously represent their clients, we abhor unnecessary litigation which delays the judicial process and clogs the judicial system.

Accordingly, the judgment of the circuit court is affirmed in part, reversed in part, and remanded with directions that the circuit court consider the merits of Hargrove's contribution claim against Gerill and Heinz.

Affirmed in part; reversed in part and remanded.

NASH, DUNN, INGLIS, JJ.

APPENDIX D

[FILED FEBRUARY 13, 1987]

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT

No. 82 CH 1032

GERILL CORPORATION, An Illinois Corporation, and GERALD A. HEINZ and JOHN F. ROSCH, individuals,

Plaintiffs and Counter-Defendants

vs

JACK L. HARGROVE BUILDERS, INC., a corporation, and JACK L. HARGROVE, an individual, and CONCORDIA FEDERAL SAVINGS AND LOAN, a corporation,

Defendants and Counter-Plaintiffs

and

JACK L. HARGROVE BUILDERS, INC., a Corporation, and JACK L. HARGROVE, an individual,

Third Party Plaintiffs

vs

GERILL CORPORATION, an Illinois Corporation, and GERALD A. HEINZ, an individual,

Third Party Defendants

D2

JUDGMENT ORDER
ON
COUNTS I AND II OF THIRD AMENDED COMPLAINT
OF PLAINTIFF JOHN F. ROSCH
AGAINST DEFENDANTS JACK L. HARGROVE
BUILDERS, INC., AND JACK L. HARGROVE FOR
INTENTIONAL MISREPRESENTATION
AND
COUNT V OF THIRD AMENDED COUNTERCLAIM OF
COUNTERPLAINTIFFS JACK L. HARGROVE BUILDERS,
INC., AND JACK L. HARGROVE AGAINST
COUNTERDEFENDANTS GERILL CORPORATION,
GERALD A. HEINZ AND JOHN F. ROSCH
FOR RECOVERY ON A LOAN
AND
THIRD PARTY COMPLAINT OF THIRD PARTY
PLAINTIFFS JACK L. HARGROVE BUILDERS, INC.
AND JACK L. HARGROVE AGAINST
THIRD PARTY DEFENDANTS
GERILL CORPORATION AND GERALD A. HEINZ
FOR CONTRIBUTION

Counts I and II of Third Amended Complaint of plaintiff JOHN F. ROSCH against defendants JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE for Intentional Misrepresentation, and Count V of Third Amended Counterclaim of counterplaintiffs JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE against counterdefendants GERILL CORPORATION, GERALD A. HEINZ and JOHN F. ROSCH for recovery on a loan and third party complaint of third party plaintiffs JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE against third party defendants GERILL CORPORATION and GERALD A. HEINZ for contribution having come on for trial, the Court having issued opinion dated December 8, 1986, having considered counsels' proposed judgment orders, and objections, having heard counsels' final arguments on third party claim for contribution,

THE COURT FINDS as to Counts I and II of Third Amended Complaint of plaintiff JOHN F. ROSCH against Defendants JACK L. HARGROVE BUILDERS, INC. and JACK L. HARGROVE for Intentional Misrepresentation as follows:

(1) The defendants JACK L. HARGROVE BUILDERS, INC. and JACK L. HARGROVE intentionally misrepresented liabilities of joint venture in inducing the plaintiff JOHN F. ROSCH to enter into written agreement of March 1, 1981.

(2) The plaintiff JOHN F. ROSCH is entitled to compensatory damages prayed for in Count I but not to punitive damages prayed for in Count II.

(3) The plaintiff JOHN F. ROSCH is entitled to recover 50% of the following amounts as compensatory damages:

(Exhibit A, attached hereto and incorporated herein by reference, sets out the basis of calculating the following items.)

Air Aid Heating & Cooling	$ 9,508.00
Alsterda Cartage & Construction Co.	121,698.50
Burke Engineering	8,607.93
Dahl Law Suit	8,000.00
Jack Flanigan Marketing	6,300.00
Lisle Electric, Inc.	28,311.76
Mark Plumbing Co.	10.750.00
W. G. Meneou Cabinet Co.	6.576.00
Ready Paving & Construction Co.	17,896.45
Village of Woodridge and County of DuPage	79,950.72
Total	$297,599.39

(4) The plaintiff JOHN F. ROSCH is not entitled to recover compensatory damages on remaining claims on the ground that plaintiff's reliance on defendants' failure to

disclose liabilities was not justified as is required to be proven to recover under the tort of intentional misrepresentation, and March contract payments were future events on 3-1-81. Nothing in this order should operate as *res judicata* or estoppel or otherwise preclude plaintiff from seeking recovery in accounting or in any action other than intentional misrepresentation on the following disallowed claims:

Real Estate Taxes	$118,773.81
Tax Escrows	24,520.99
March Contract Payments	99,497.71
Concordia Mortgage	396,000.00
Renter's Deposits	18,969.00
First Natl. Bank of Oak Lawn	290,043.45

IT IS HEREBY ORDERED that on Count I of Third Amended Complaint of plaintiff JOHN F. ROSCH for Intentional Misrepresentation judgment enters for plaintiff JOHN F. ROSCH against defendants JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE in the amount of $148,799.69 plus costs. No interest is awarded.

IT IS FURTHER ORDERED that on Count II of Third Amended Complaint of plaintiff JOHN F. ROSCH for Intentional Misrepresentation judgment enters for defendants JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE and against plaintiff JOHN F. ROSCH.

IT IS FURTHER ORDERED that on Count V of Third Amended Counterclaim of counterplaintiff JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE against counterdefendants GERILL CORPORATION, GERALD A. HEINZ and JOHN F. ROSCH for Recovery of a Loan, judgment enters for counterdefendants GERILL CORPORATION, GERALD A. HEINZ

and JOHN F. ROSCH and against counterplaintiffs JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE.

IT IS FURTHER ORDERED that on Third Party Complaint of third party plaintiffs JACK L. HARGROVE BUILDERS, INC., and JACK L. HARGROVE against third party defendants GERILL CORPORATION and GERALD A. HEINZ for Contribution the section 2-619 motion of GERILL CORPORATION and GERALD A. HEINZ is granted and this cause is dismissed with prejudice.

IT IS FURTHER ORDERED that opinion dated December 8, 1986, and Supplemental Opinion dated February 13, 1987, copy of each attached, are incorporated herein by reference.

THE COURT SPECIALLY FINDS that there is no just reason to delay enforcement or appeal of this judgment order.

ENTER: /s/ Helen C. Kinney
Circuit Judge

DATED: February 13, 1987

EXHIBIT A

Air Aid Heating & Cooling

$30,908.00 disclosed/ $40,416.00 proven/ $9,508.00 difference

Alsterda Cartage & Construction Co.

$1,274.50 disclosed/ $122,973.00 proven/ $121,698.50 difference

Burke Engineering

$55,871.67 disclosed/ $64,479.60 proven/ $8,607.93 difference

Dahl Law Suit

-0- disclosed/ $8,000 proven/ $8,000 difference

Jack Flanigan Marketing

-0- disclosed/ $6,300 proven/ $6,300 difference

Lisle Electric, Inc.

$19,282.30 disclosed, but plaintiff's higher figure of $19,929.00 accepted/ $48,241.66 proven/ $28,311.76 difference

Mark Plumbing Co.

$55,935.00 disclosed/ $66,685.00 proven/ $10,750.00 difference

W. G. Meneou Cabinet Co.

-0- disclosed/ $6,576.00 proven/ $6,576.00 difference

Ready Paving & Construction Co.

$22,190.47 disclosed/ $40,086.92 proven/ $17,896.45 difference

Village of Woodridge and County of Du Page

-0- disclosed/ $79,950.75 proven/ $79,950.75 difference

State of Illinois
County of Du Page—ss

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT

No. 82 CH 1032

GERILL CORPORATION, an Illinois corporation, GERALD A. HEINZ, and JOHN F. ROSCH, individuals,

Plaintiffs and Counter-defendants,

v.

JACK L. HARGROVE BUILDERS, INC., a corporation, JACK L. HARGROVE, an individual, and CONCORDIA FEDERAL SAVINGS AND LOAN, a corporation,

Defendants and Counter-plaintiffs.

LETTER OF OPINION

This letter is written to instruct counsel on drafting a judgment order and to set out the decision rationale. The order is to provide that this letter of opinion is incorporated into the order which is to be presented January 23, 1987, at 2:00 P.M. with an advance copy served on other counsel.

COMPLAINT OF ROSCH, COUNTS I AND II, AGAINST HARGROVE FOR INTENTIONAL MISREPRESENTATION

There are conflicts in the testimony of various witnesses. I find the testimony of Mr. Heinz, Mr. Rosch, and Mr. Gilmartin credible and the testimony of Mr. Hargrove and Miss Peloza incredible where there is conflict on important points. I specifically find truthful the testimony of Mr. Rosch that before signing the agreement and paying the $200,000.00 he did ask Mr. Hargrove if all liabilities were disclosed and that Mr. Hargrove responded that they were.

Two elements of the tort of intentional misrepresentation deserve particular consideration as they apply to this case.

The first is that a plaintiff's reliance on a misrepresentation must be justified. See *Central States Joint Board v. Continental Assurance Company*, 117 Ill. App. 3d 600 at 606 and 607. "In determining whether reliance was reasonable, all of the facts which plaintiff had actual knowledge of, as well as all of those it might have learned if it had used ordinary prudence, must be taken into account; if ample opportunity existed to discover the truth, then reliance is not justified." *National Republic Bank v. National Homes Construction Corp.*, 63 Ill. App. 3d 920 at 925.

The financial sophistication of Mr. Hargrove is at least equal to that of Mr. Rosch. He should not be considered even slightly disadvantaged. As plaintiff's counsel expressed it, Mr. Hargrove does know how to count.

Everyone understood this was a high stakes transaction involving chance of substantial profit or loss. The flavor of it is reflected in the subsequent approval of Mr.

Heinz and Mr. Rosch, without consideration, to tack on a $71,000.00 liability that Mr. Hargrove had failed to disclose.

The second element of the tort in question that deserves discussion in its application to this case is that defendant must make the misrepresentation knowing it is false or with reckless disregard whether it is true or false. The shadings of this element have been collected in *Duhl v. Nash Realty Inc.*, 102 Ill. App. 3d 483 at 491 in the following passage:

> "A party is considered to intend the necessary consequences of his own acts. (*Posner v. Davis* (1979), 76 Ill. App. 3d 638, 395 N.E.2d 133.) Accordingly, one who knowingly makes a false statement to another who relies thereon is guilty of fraud regardless of the defendant's motive and the plaintiff is not required to prove an express fraudulent intent. (*Case v. Ayers* (1872), 65 Ill. 142; *Broberg v. Mann* (1965), 66 Ill. App. 2d 134, 213 N.E.2d 89; *John v. Farrell Co. v. Nathanson* (1900), 99 Ill. App. 185.) And knowledge of wrongdoing sufficient to support an action for fraud exists where representations which are in fact false are made in reckless disregard of their truth or falsity. (*Hurley v. Frontier Ford Motors, Inc.* (1973), 12 Ill. App. 3d 905, 299 N.E.2d 387, appeal denied (1973), 12 Ill. App. 3d 905, 299 N.E.2d 387, appeal denied (1973), 54 Ill. 2d 597; *Solazzi v. Casola* (1952), 345 Ill. App. 407, 103 N.E.2d 164 (abstract); *Tone v. Halsey Stuart & Co., Inc.* (1936), 286 Ill. App. 169, 3 N.E.2d 142; *Snively v. Meixsell* (1901), 97 Ill. App. 365.) Likewise statements made in culpable ignorance of their truth or falsity are fraudulent. (*Oltner v. Zamora* (1981), 94 Ill. App. 3d 651, 418 N.E.2d 506.) Indeed, it has been held that good faith is no defense where the fraud and deceit practiced consist, as here, of making false statements of fact as to the knowledge of the speaker. (*Brennan v. Perselli* (1932), 266 Ill. App. 441, *aff'd* (1933), 353 Ill.

> 630, 187 N.E. 820; *National Bank v. Hamilton* (1916), 202 Ill. App. 516.) As the Illinois Supreme Court remarked in *Brennan v. Persselli* (1933), 353 Ill. 630, 635, 187 N.E. 820, 822: 'it is immaterial whether a party misrepresenting a material fact knows it to be false or makes the assertion of the fact without knowing it to be true, for the affirmation of what one does not know to be true is unjustifiable, and if another act upon the faith of it, he who induced the action must suffer, and not the other.' "

One of the items for which plaintiff claims damages due to an undisclosed charge upon which the venture property is the fee for building permits. Defendant's counsel has argued that as the evidence shows Mr. Hargrove first said the building permits had been obtained and later admitted they had not, he could not have engaged in intentional misrepresentation as he did not "know." The argument is invalid. Ignorance of the facts or making a representation based on an inadequate "accordion file" or a "chaotic file", if indeed that occurred, is the legal equivalent of "knowledge" that the incomplete disclosure of liabilities was false.

Considering that Mr. Rosch was coming into a joint venture that had been conducted for years without any written agreement, with Mr. Hargrove having almost autonomous charge of authorizing payment for construction work and other services rendered to the venture, Mr. Rosch was justified in relying upon Mr. Hargrove's representation as to this type of liability. These kinds of liabilities fluctuate and are difficult to verify at any point in time, let alone to identify at all.

Consequently, Mr. Rosch will have judgment in Count I for one-half (based on his 50% interest in the venture) of the amount by which liabilities for payment to the following persons or entities exceeded disclosure by Mr.

Hargrove: Air Aid Heating; Burke Engineering; Lisle Electric; Mark Plumbing; Meneou Cabinet; Village of Woodridge; Dahl law suit; Jack Flanigan Marketing; Ready Paving; and Alsterda. Duplicate billings or rebillings are not to be included.

The remaining items (See plaintiff's Exhibit 6) are not allowed even though Mr. Hargrove clearly misrepresented them. Evidence offered by Hargrove to show the Concordia mortgage was lumped with the Unity loan is not believable. While it seems incongruous to reward misrepresentation with prevailing in a dispute, these claims must be refused solely on the ground that reliance was neither reasonable nor prudent. Mortgages are recorded, lending institutions have records, taxes accrue, and existence and turnover of tax escrow accounts could have been required. Any misappropriation of March collections was a future event at the time the agreement was signed. This element of justified reliance is unique to the tort of intentional misrepresentation and does not control or preclude recovery of disallowed items in accounting or otherwise.

Punitive damages are not appropriate and judgment on Count II will be entered for Hargrove.

HARGROVE COUNTERCLAIM FOR $30,000.00 BALANCE ON LOAN TO GERRIL / HEINZ / ROSCH VENTURE

The root of the claim is that $50,000.00 was deposited by lender Hargrove into an account controlled exclusively by Hargrove. None of the claimed borrowers, Gerrill, Heinz, or Rosch, had any signatory powers in the account.

On February 28, 1981, and immediately before deposit of $50,000.00 on March 2, 1981, the account had a negative balance in excess of $17,000.00. Hargrove acknowledges

withdrawal of $10,000.00 upon each of two subsequent occasions for benefit of Hargrove.

There is a noticeable lack of supporting documentation, and Miss Peloza's testimony has been impeached in other areas. Hargrove fails to sustain the burden of proof that money is owed because of payments made for the Rosch/Heinz venture on liabilities arising after March 1, 1981.

RECONSIDERATION OF SUMMARY JUDGMENT

Reconsideration of Summary Judgment against Hargrove on Hargrove's Count XIII will be denied.

Hargrove had ample time to gather evidence and prepare for the September 26, 1986, hearing on the motion for summary judgment.

The question at issue was whether Hargrove Builders or Hargrove had any liability on a $352,000 Concordia mortgage undertaken by Beverly State Bank as Trustee and had made any payments on it for which counterdefendants had failed to indemnify them. Any payments made would be a matter particularly within the knowledge of Hargrove.

Yet Hargrove submitted nothing raising a question of fact on the issue either in response to the motion or in support of Hargrove's cross motion. Hargrove now fails to show that by exercising even a pedestrian level of diligence it could not have submitted whatever else it desired to put before the court on the issue at the time the motion was heard.

CONCLUSION

The conduct of this litigation in behalf of Hargrove has sometimes tended to make it unnecessarily complex. The trial was vexatiously lengthened by Hargrove's repeated efforts, after ruling had been obtained and a record sufficient for appeal made, to introduce testimony and exhibits deemed irrelevant.

After years of dissolution, the Hargrove corporation was revived a few weeks before trial, with the request that Miss Peloza, as a corporate officer, remain in the courtroom throughout the trial from which witnesses were excluded. In a conference with counsel following an objection of privilege, it was acknowledged that Miss Peloza had appeared for deposition as a witness with her own attorney, Mr. Allen Brown. This piece of posturing in the management of Hargrove's case did not enhance the credibility of Miss Peloza's testimony.

The discovery process was difficult, requiring the intervention of the court to conclude Miss Peloza's deposition and to resolve repetitious demands. Yet Hargrove's counsel stated inaccurately that the court had denied Hargrove's motion to redepose Mr. Rosch on the ground an earlier assigned judge had so ordered. Order entered April 3, 1986, provides in pertinent part the following:

> "6) Motion of Hargrove to redepose John Rosch is denied on the ground that Hargrove and Rosch agree that the attached pending Supplemental Request to Produce (Exhibit A) and previously filed Schedule of Documents of Rosch (Exhibit B) cover the inquiry. The ruling of the court on specific items or agreement of Rosch and Hargrove on specific items are reflected on the face of Exhibits A and B and these exhibits are incorporated herein."

This suit has many parts, some severed for manageability, with an accounting action of Gerril [sic] and Heinz and a law count of Hargrove still pending. In the interests of bringing to a conclusion those segments of it which have been adjudicated, you are to include in the order that the judgments are final and that the court finds no just reason to delay enforcement or appeal.

/s/ Helen C. Kinney
Helen C. Kinney,
Circuit Judge

Dated: December 18, 1986

[1]* # APPENDIX E

[FILED JULY 13, 1989]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

JOHN FRANKLIN ROSCH, JAMES REAGIN, TIMOTHY HEUER, ALAN KIRCHNER, C. GARY SPANIAK, NORBERT MURRAY and DAVID R. DAVID

No. 89 CR 592
Violations: Title 18, United States Code, Sections 2, 371, 657, 1341, 1343, and 1962(d)

COUNT ONE

The SPECIAL APRIL 1987 GRAND JURY charges:

1. At times material to this Indictment:

* Numbers in brackets refer to the original typescript page numbers of the Indictment.

(a) Glen Ellyn Savings and Loan Association (hereinafter Glen Ellyn Savings) was a savings and loan association chartered by the State of Illinois that maintained its principal place of business in Glen Ellyn, Illinois. The deposits of Glen Ellyn Savings were insured by the Federal Savings and Loan Insurance Corporation (hereinafter FSLIC).

(b) First Savings of South Beloit was a savings and loan association chartered by the State of Illinois that maintained its principal place of business in South Beloit, Illinois. The deposits of First Savings of South Beloit were insured by the FSLIC.

(c) The American Bank of Alma (hereinafter Bank of Alma) was a bank chartered by the State of Wisconsin that maintained its principal place of business in Alma, Wisconsin. The deposits of the Bank of Alma were insured by the Federal Deposit Insurance Corporation (hereinafter FDIC).

(d) Defendant JOHN FRANKLIN ROSCH was the President and chief operating officer of Glen Ellyn Savings. Additionally, he was an attorney who performed legal services on behalf of Glen Ellyn Savings.

[2] (e) Defendant TIMOTHY HEUER was the President, chief operating officer, and sole shareholder of First Savings of South Beloit.

(f) Defendant ALAN KIRCHNER was the President, chief operating officer, and sole shareholder of the Bank of Alma.

(g) Defendant JAMES REAGIN was a businessman and real estate developer based in Dallas, Texas.

(h) C. Gary Spaniak and defendant NORBERT MURRAY were partners in Shopping Center Development

Company of America (hereinafter Shopping Center Development), which was a real estate development firm that developed shopping centers in many states.

(i) The FSLIC was a regulatory agency of the United States government, which insured the deposits of its member institutions and which was directed by the Federal Home Loan Bank Board (hereinafter FHLBB).

(j) The FHLBB was a regulatory agency of the United States government that had regulatory authority to ensure, among other things, that each FSLIC-insured institution's lending policies and practices were sound, that the institution's net worth was adequate and financial condition was sound, that the institution was operated within the restrictions of federal regulations, and that the records of the institution were properly and accurately maintained.

(k) The FDIC was a regulatory authority of the United States government that had supervisory authority over FDIC-insured banks and financial institutions and their affiliates and subsidiaries. The FDIC had authority to ensure, among other things, that each institution's lending policies and practices were sound, that the institution's net worth was adequate and financial condition was sound, that the institution was operated within the restrictions of federal regulations, and that records of the institution were properly and accurately maintained.

[3] (l) Defendants JOHN FRANKLIN ROSCH, TIMOTHY HEUER and ALAN KIRCHNER were required to follow all federal and state laws and regulations regarding the operations of financial institutions, including: a) regulations that prohibited each institution from making loans to officers and other persons affiliated with the institution without full disclosure to the institution's Board of Directors; b) regulations that limited the amount of

funds that could be loaned to one borrower; and c) regulations that required each institution to keep accurate and complete records of all business transactions of the institution.

—*THE ENTERPRISE*

(m) Defendant JOHN FRANKLIN ROSCH, JAMES REAGIN, TIMOTHY HEUER, ALAN KIRCHNER, and NORBERT MURRAY, and C. Gary Spaniak, Glen Ellyn Savings, First Savings of South Beloit, the Bank of Alma, and Shopping Center Development formed and were an association-in-fact and constituted an enterprise as that term is defined in Title 18, United States Code, Section 1961(4), the activities of which affected interstate commerce. That enterprise was on-going and had a structure that maintained operations directed towards achievement of its economic and other goals.

RELEVANT STATUTES

(n) There were in force and effect the following criminal statutes of the United States, involving mail fraud and wire fraud, each violation of which was an act of racketeering, and which stated, in relevant part, as follows:

> *Title 18, United States Code, Section 1341* (mail fraud):
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any [4] post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or

thing, or knowingly causes to be delivered by mail according to the direction thereon, . . . any such matter or thing, [shall be guilty of an offense].

Title 18, United States Code, Section 1343 (wire fraud):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, [shall be guilty of an offense].

THE CONSPIRACY

2. From in or about early 1984 and continuing through 1986, at Glen Ellyn and Chicago in the Northern District of Illinois, Eastern Division, and South Beloit in the Northern District of Illinois, Western Division, and elsewhere,

JOHN FRANKLIN ROSCH,
JAMES REAGIN,
TIMOTHY HEUER,
ALAN KIRCHNER, and
NORBERT MURRAY,

defendants herein, who were persons associated with an enterprise that engaged in and the activities of which affected interstate commerce, namely, the enterprise described in subparagraph 1 (m) above, knowingly conspired and agreed with each other, with C. Gary Spaniak, and with others known and unknown to the Grand Jury, to conduct and participate, directly and indirectly, in the conduct of that enterprise's affairs through a pattern of racketeering activity, as that term is described in Title 18,

United States Code, Section 1961, said racketeering activity consisting of multiple acts of wire fraud, in violation of Title 18, United States Code, Section 1343, and mail fraud, in violation of Title 18, United States Code, Section 1341, which acts are further described below.

[5] 3. It was further part of the conspiracy that defendants JAMES REAGIN and NORBERT MURRAY, and C. Gary Spaniak, all of whom operated businesses and participated in business ventures that required large amounts of financing, obtained substantial control over the lending activities of federally insured financial institutions by giving loans, money, and property, and by promising future loans, money and property to defendants JOHN FRANKLIN ROSCH, TIMOTHY HEUER and ALAN KIRCHNER.

4. It was further part of the conspiracy that, in exchange for loans, money, and property, and the expectation of future loans, money, and property, defendants JOHN FRANKLIN ROSCH, TIMOTHY HEUER, and ALAN KIRCHNER granted loans to each other and to defendants JAMES REAGIN and NORBERT MURRAY, and C. Gary Spaniak, and their nominees, trusts, corporations and partnerships, which loans violated federal and state laws and regulations governing financial institutions.

5. It was further part of the conspiracy that defendants JOHN FRANKLIN ROSCH, TIMOTHY HEUER, and ALAN KIRCHNER did falsify, misrepresent, and conceal material matters regarding lending from the Boards of Directors and officers of their respective institutions.

6. It was further part of the conspiracy that defendants JOHN FRANKLIN ROSCH, TIMOTHY HEUER, and ALAN KIRCHNER did falsify, misrepresent, and conceal material matters regarding lending from federal and state bank examiners.

7. It was part of the conspiracy that defendants JOHN FRANKLIN ROSCH, JAMES REAGIN, TIMOTHY HEUER, ALAN KIRCHNER, and NORBERT MURRAY, and C. Gary Spaniak, and their co-conspirators agreed that the enterprise would be conducted through the commission of two or more acts of racketeering activity, namely acts of mail fraud and wire fraud, which acts would constitute a pattern of racketeering activity in the conduct of the affairs of the enterprise.

* * * * *

[63] *COUNT TWENTY-NINE*

The SPECIAL APRIL 1987 GRAND JURY further charges:

1. At times material to this indictment:

(a) Glen Ellyn Savings and Loan Association (hereinafter Glen Ellyn Savings) was a savings and loan association chartered by the State of Illinois that maintained its principal place of business in Glen Ellyn, Illinois. The deposits of Glen Ellyn Savings were insured by the Federal Savings and Loan Insurance Corporation (hereinafter FSLIC).

(b) Defendant JOHN FRANKLIN ROSCH was the President and chief operating officer of Glen Ellyn Savings. Additionally, he was an attorney who performed legal services on behalf of Glen Ellyn Savings.

(c) Michael Pietrzak was an associate of defendant JOHN FRANKLIN ROSCH.

(d) The FSLIC was an agency of the United States, which insured the deposits of its member institutions and which was directed by the Federal Home Loan Bank Board (hereinafter FHLBB).

(e) The FHLBB was a regulatory agency of the United States government that had regulatory authority to en-

sure, among other things, that each FSLIC-insured institution's lending policies and practices were sound, that the institution's net worth was adequate and financial condition was sound, that the institution was operated within the restrictions of federal regulations, and that the records of the institution were properly and accurately maintained.

(f) Defendant JOHN FRANKLIN ROSCH, was required to follow all federal and state laws and regulations regarding the operations of financial institutions, including: a) regulations that prohibited each institution from making loans to officers and other persons affiliated with the institution without full disclosure to the institution's Board of Directors; b) regulations that limited the amount of funds that [64] could be loaned to one borrower; and c) regulations that required each institution to keep accurate and complete records of all business transactions of the institution.

2. Pursuant to federal and state laws and regulations in force at times relevant to this Indictment, an officer of an FSLIC-insured institution seeking commercial credit from the institution in excess of $10,000 was required to fully disclose to the Board of Directors his or her interest in the proposed loan. The officer could not participate in the decision to grant the loan. Approval could be granted only by a majority of disinterested directors, by duly adopted resolution.

3. From at least 1981 until approximately 1987, at Glen Ellyn and elsewhere in the Northern District of Illinois, Eastern Division,

JOHN FRANKLIN ROSCH,

defendant herein, with Michael Pietrzak and others known and unknown to the Grand Jury, devised, intended to devise, and participated in a scheme and artifice to de-

fraud and to obtain money and property from Glen Ellyn Savings by false and fraudulent pretenses, representations and promises, which scheme is further described as follows.

4. It was part of the scheme that defendant JOHN FRANKLIN ROSCH, while he was President of Glen Ellyn Savings held financial interests in a number of real estate development projects and, in violation of state and federal banking regulations, caused Glen Ellyn Savings to grant loans for these projects while concealing from the Board of Directors his financial interests in the projects.

$840,000 Loan for Woodridge Real Estate Projects

5. It was further part of the scheme that in approximately March 1981, a certain individual, who had held a 50% interest in six real estate development projects in Woodridge, Illinois, sold all his interest in the projects to defendant JOHN FRANKLIN ROSCH, who thereby became an equal partner in these projects with another individual (hereinafter referred to as "partner").

6. It was further part of the scheme that on or about May 12, 1981, the Board of Directors of Glen Ellyn Savings approved a proposed loan in the amount of $840,000 [65] for several portions of the Woodridge projects in which defendant JOHN FRANKLIN ROSCH had a 50% interest. Defendant JOHN FRANKLIN ROSCH concealed his interest from the Board of Directors, and the proposed loan was presented to the Board of Directors in the name of the individual from whom defendant JOHN FRANKLIN ROSCH had purchased his interest, and who was no longer involved in the projects.

7. It was further part of the scheme that in March 1982, after condominiums were built in one of the Wood-

ridge projects and over one hundred land contracts were sold to prospective purchasers of the condominium units, defendant JOHN FRANKLIN ROSCH caused Glen Ellyn Savings to purchase the land contracts. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors the fact that he held a 50% interest in these contracts.

8. It was further part of the scheme that defendant JOHN FRANKLIN ROSCH and his partner gained approximately $500,000 from the sale of the land contracts to Glen Ellyn Savings, many of which land contracts later defaulted, resulting in a loss to Glen Ellyn Savings of approximately $367,000.

Loans for Vernon Hills Properties

9. It was further part of the scheme that, in January 1981, when his partner had reached his lending limit at Glen Ellyn Savings, defendant JOHN FRANKLIN ROSCH recruited Michael Pietrzak to apply to Glen Ellyn Savings for loans totalling approximately $1,102,500 for the purchase of real estate in Vernon Hills, Illinois, which property was placed in a trust at DuPage County Bank.

10. It was further part of the scheme that defendant JOHN FRANKLIN ROSCH caused a false financial statement to be submitted to Glen Ellyn Savings on behalf of Michael Pietrzak, in which the assets and income of Michael Pietrzak were substantially overstated.

11. It was further part of the scheme that, on or about January 14, 1981, defendant JOHN FRANKLIN ROSCH and his partner agreed to pay approximately [66] $45,000 to Michael Pietrzak, who, in return, assigned the beneficial interest in the trust to defendant JOHN FRANKLIN ROSCH and his partner.

12. It was further part of the scheme that also on January 14, 1981, Michael Pietrzak entered into a "hold harmless" agreement with defendant JOHN FRANKLIN ROSCH and his partner whereby Michael Pietrzak would not be held responsible for the repayment of the loans from Glen Ellyn Savings that would finance the purchase of the Vernon Hills real estate.

13. It was further part of the scheme that defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors of Glen Ellyn Savings both the assignment of the trust and the "hold harmless" agreement, and he did not place either document in the loan files.

14. It was further part of the scheme that on or about March 20, 1984, defendant JOHN FRANKLIN ROSCH asked the Board of Directors of Glen Ellyn Savings to approve two additional loans, each for $480,000, to develop the Vernon Hills real estate. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors that he held a 50% interest in the development of this real estate.

15. It was further part of the scheme that on or about January 25, 1985, three additional loans, each for approximately $240,000, were made by Glen Ellyn Savings to develop the Vernon Hills real estate. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors that he held a 50% interest in the development of this real estate.

16. It was further part of the scheme that after the Vernon Hills real estate development project was completed, defendant JOHN FRANKLIN ROSCH and his partner made a profit. As his share of the profit, defendant JOHN FRANKLIN ROSCH received a check for $50,000 on September 26, 1986, and a check for $4,500 on September 18, 1987.

[67] *Loans for the Piers Project*

17. It was further part of the scheme that on or about July 20, 1982, in connection with a real estate development called the "Piers" project, which was one of the Woodridge projects in which defendant JOHN FRANKLIN ROSCH held a 50% interest, defendant JOHN FRANKLIN ROSCH asked the Board of Directors of Glen Ellyn Savings to approve two loans, each for $350,000, which had been disbursed on June 10, 1982. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors his interest in the Piers project.

18. It was further part of the scheme that on or about September 23, 1983, defendant JOHN FRANKLIN ROSCH caused two loans, each for approximately $350,000, to be made by Glen Ellyn Savings to develop the Piers project. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors his 50% interest in the Piers project.

19. It was further part of the scheme that on or about November 15, 1983, defendant JOHN FRANKLIN ROSCH asked the Board of Directors of Glen Ellyn Savings to approve another loan for approximately $350,000 which had been disbursed on September 23, 1983, and which was to be used in developing the Piers project. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors his 50% interest in the Piers project.

20. It was further part of the scheme that on or about March 25, 1985, defendant JOHN FRANKLIN ROSCH caused two loans, each for approximately $700,000, to be made by Glen Ellyn Savings for the Piers project. Defendant JOHN FRANKLIN ROSCH concealed from the Board of Directors his 50% interest in the Piers project.

21. It was further part of the scheme that the completion of the Piers project resulted in a profit to defendant JOHN FRANKLIN ROSCH and his partner. As a portion of his share of the profit, defendant JOHN FRANKLIN ROSCH received a $4,000 check [68] on or about April 10, 1986, a $14,063 check on or about July 25, 1986, and a $9,000 check on or about September 18, 1987.

22. On or about April 10, 1986, at Westmont, in the Northern District of Illinois, Eastern Division,

JOHN FRANKLIN ROSCH,

defendant herein, for the purpose of executing the aforesaid scheme and attempting to do so, knowingly caused to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service, an envelope containing a check in the amount of $4,000, that envelope being addressed to John Franklin Rosch, Glen Ellyn Savings and Loan, 497 Main Street, Glen Ellyn, Illinois 60137;

In violation of Title 18, United States Code, Section 1341.

* * * * *

A TRUE BILL:

/s/ Joseph Y. Grossi
Foreperson

/s/ Anton R. Valukas
United States Attorney